No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

BORDEN RANCH PARTNERSHIP;
ANGELO K. TSAKOPOULOS,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS;
UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The issue presented by this case is whether a farmer needs a federal permit to plow his agriculturally-zoned ranchland to plant new crops. Section 404 of the Clean Water Act authorizes the Army Corps of Engineers to require permits only for those activities that "discharge" or "add" a "pollutant" from a "point source" into waters of the United States, and further expressly exempts "normal farming and ranching activities, such as plowing," which do not convert the body of water "into a use to which it was not previously subject." Petitioners acquired the Borden Ranch, an 8,400 acre property in California's Central Valley that is zoned for agricultural use, and sought to enhance portions of the land that previously had been used to grow forage crops for higher value vineyards and orchards. Petitioners did this by deep plowing to prepare the soil for these deep-rooted crops. The Army Corps asserted jurisdiction under Section 404 of the Clean Water Act over these plowing activities, claiming petitioners were discharging pollutants into seasonal wetlands. The Ninth Circuit upheld this assertion of federal jurisdiction, over Judge Gould's dissent and in conflict with the D.C. Circuit's *National Mining* decision.

The questions presented are:

1. Does a rancher's deep plowing to enhance the soil's agricultural viability "add" a "pollutant" to a wetland so as to constitute a regulated point-source "discharge" within the meaning of Section 404 of the Clean Water Act?

QUESTIONS PRESENTED – Continued

2. Is deep plowing of ranchland, which is used to grow forage crops and is farmable in its natural state, in order to plant crops with deeper root systems, statutorily exempt from regulation under Section 404 as a "normal farming activity" that does not bring a water of the United States "into a use to which it was not previously subject"?

3. Does the Clean Water Act's civil penalty section, authorizing penalties "not to exceed $25,000 per day for each violation," authorize assessing the maximum daily penalty for each time a plow crosses a jurisdictional drainage feature, without regard to the number of days when such activity occurred?

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Borden Ranch Partnership and Angelo K. Tsakopoulos respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The court of appeals' opinion (App., *infra*, 1-22) is reported at 261 F.3d 810. The district court's opinion on summary judgment (App., *infra*, 28-56) is unreported. Its decision after the counterclaim trial (App., *infra*, 67-121) is unofficially reported at 1999 WL 1797329. The district court's summary judgment opinion in a related action, *Angelo K. Tsakopoulos v. American Manufacturers Mutual Insurance Co., et al.* (U.S. Dist. Ct. E.D. Cal.), Civ. No. S-99-0853 GEB JFM (Hon. Garland E. Burrell, Jr.) (App., *infra*, 135-164) is unreported. The U.S. Army Corps of Engineers' ("Corps") December 12, 1996 Regulatory Guidance Letter setting forth the basis for its regulation of petitioners' deep plowing is set out at App., *infra*, 199-207.

JURISDICTION

The court of appeals' opinion was filed August 15, 2001. On November 28, 2001, the court of appeals issued its Order denying petitioners' petition for rehearing *en banc*. On December 18, 2001, the court of appeals issued its Order granting petitioners' motion to stay the mandate pending filing of this petition. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Clean Water Act, 33 U.S.C. Sections 1311(a), 1319(d), 1344(a), (f), 1362(6), (12), (14), and (16), are reproduced at App., *infra*, 209-213. The relevant regulations, 40 C.F.R. Section 232.4(4)(iii), 40

C.F.R. Section 232.3(c)(1)(i),(ii) and (d)(4), and 33 C.F.R. Section 323.2(d)(1), (iii), (2)(i),(ii), (3)(iii), (4)(iii) and 33 U.S.C. Section 323.4(a)(1)(i), (ii), (iii)(D), are reproduced at App., *infra*, 213-218.

STATEMENT

The fundamental issue in this case is whether a farmer and rancher may deeply plow his agriculturally-zoned ranchland to plant higher value crops without need of a federal permit or, conversely, whether the Corps has jurisdiction to regulate such traditional plowing activity under the Federal Clean Water Act ("CWA" or "Act"). The Corps asserts such jurisdiction in this case and others, contending that the traditional farming activity of *plowing alone* of dry ground in areas of seasonal wetlands constitutes the "discharge" of "pollutants" (native soil) from a "point source" (the plow) which is regulated under CWA Section 404.

The Corps' expansive claim of federal permitting jurisdiction over traditionally local activities – such as farming and plowing – under CWA Section 404[1] has resulted in conflict among the courts of appeals as to the statute's reach. The D.C. Circuit has held "incidental fallback" of native materials from a dredge bucket during aquatic dredging operations is not an "addition" of pollutants and thus not a "discharge" of dredged or fill material regulated under Section 404, because no materials are added and the disturbed native materials fall back to their same general location. *National Mining Ass'n. v. U.S. Army Corps of Eng'rs.*, 145 F.3d 1399, 1404 (D.C. Cir. 1998).

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[1] 33 U.S.C. § 1344, see App., *infra*, 210-211. Congress did not intend CWA Section 404 to extend to normal farming activities, which it contemplated would be "controlled by State and local agencies under [the Act's non-point source provisions]." S. Rep. No. 95-370, at 76 (1977), reprinted in 1977 U.S.C.C.A.N. 4326, 4401.

It further held the CWA farmer exemptions for plowing and other normal farming activities evince that Congress "emphatically did not want the law to impede these bucolic pursuits." *Id.* at 1405.

The Ninth Circuit, by contrast in its 2-1 decision here (Judge Gould, dissenting), holds deep plowing – which also adds no materials and results in plowed native soil falling back to its same general location – produces a "regulable redeposit" of the plowed soil "pollutant" because it "constitutes environmental damage sufficient to constitute a regulable redeposit." App., *infra*, 8. Over the strong dissent of Judge Gould, who would have followed *National Mining* and held "the return of soil in place after deep plowing is not a 'discharge of a pollutant[,]' " App., *infra*, 18, the panel majority relied on the Ninth Circuit's prior decision holding redeposits of extracted and processed materials from in stream placer mining operations are regulated, and a Fourth Circuit decision (citing the same Ninth Circuit decision) holding "sidecasting" from backhoe dredging to drain wetlands for residential subdivision construction was regulated. *Rybachek v. United States EPA*, 904 F.2d 1276, 1285 (9th Cir. 1990); *United States v. Deaton*, 209 F.3d 331, 333-336 (4th Cir. 2000). App., *infra*, 6-8.

Despite the express statutory exemption for any "discharges" from "normal farming . . . and ranching activities such as plowing . . . for the production of food, fiber . . . ," App., *infra*, 210, the Ninth Circuit also holds the "recapture" exception to the exemption applies because "[c]onverting ranch land to orchards and vineyards is clearly bringing the land 'into a use to which it was not previously subject[.]' " App., *infra*, 10; see App., *infra*, 211.

The Ninth Circuit's decision is legally erroneous and inconsistent with the CWA's plain language and legislative history, as well as *authorized* implementing regulations. Plowing alone does not "add" pollutants or soil

and does not produce regulated point source "discharges." No statute or regulation states plowing is a CWA-regulated activity. Moreover, the relevant statutes and regulations expressly *exempt all forms of plowing* from Section 404 regulation as required by Section 404(f)(1)'s "farmer exemptions." App., *infra*, 210; *see* App., *infra*, 212 (exempting agricultural runoff from point source program). No other case has ever invoked the facially-narrow "recapture provision" to hold plowing *alone* – as opposed to plowing conducted incidental to and as a minor part of other activities primarily intended to fill and dry out waters or wetlands – is a CWA-regulated activity. No other case has held plows used only for normal farming purposes are "point sources." Dissenting from the Ninth Circuit panel majority's complete evisceration of the Act's fundamental jurisdictional requirements and farmer exemptions, Judge Gould would have held return of soil in place after deep plowing is not a "discharge," because "deep ripping" does not involve any significant removal or "addition" of material to the site, and plows are not "point sources." App., *infra*, 19-22. He observed the majority was making new law in upholding federal regulation under Section 404's point source program of a traditional farming activity without any clear or express Congressional authorization of that result. App., *infra*, 22.

Given (1) the split among circuits on whether "incidental fallback" is a regulated "discharge," (2) the statutorily untenable basis of the Corps' position that it may regulate any form of mere plowing of agricultural land as a point-source discharge, (3) the nationwide importance of agriculture and (4) the nationwide importance of effectuating Congress' intent to meaningfully exempt farming activities from Section 404, this Court's review of the legality of the Corps's assertion of federal permitting jurisdiction over normal farming activities in this case is appropriate and necessary at this time. Congress did not

intend to federalize regulation of traditionally local land use matters when it adopted the CWA. It did not intend or envision when it enacted the CWA and its "farmer exemptions" that a farmer plowing dry, agriculturally-zoned ranchland to plant higher value crops – a normal activity farmers have engaged in since colonial times, App., *infra*, 18 – would require a federal permit for the "discharge" of "pollutants" from a "point source" to do so.

A. The Statutory and Regulatory Scheme

1. Basic Elements of Section 404 Jurisdiction

CWA Section 404 authorizes the Corps to directly regulate and issue federal permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C., § 1344(a); App., *infra*, 210. Section 301(a) provides that the "discharge of any pollutant by any person" is unlawful unless in compliance with the Act's permit requirements. § 1311(a); App., *infra*, 209. "Discharge" is defined as "any addition of any pollutant to navigable waters from any point source." § 1362(16), (12); App., *infra*, 212; *National Mining*, *supra*, 145 F.3d at 1401.[2] As a prerequisite to the existence of a regulated point source "discharge," the statute's plain text requires an "addition" of a "pollutant." To "add" is "to join or unite (to) so as to increase the number, size, quantity, etc." WEBSTER'S DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED (Encycl. ed. 1977).

The courts below treated plowed native soil as both a "pollutant" and "fill material," and plows themselves as

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[2] CWA Sections 208 and 319 direct the States to take certain steps to address *non-point source* pollution, but the States determine the nature of those steps. See 33 U.S.C. §§ 1288, 1329. Farming and ranching activities are explicitly contemplated to fall within the non-point source area subject to State and local control. E.g., 33 U.S.C. §§ 1288(b)(2)(F), 1362(14).

regulated "point sources." "Pollutants" within the Act include, *inter alia*, "dredged spoil, . . . rock, sand, cellar dirt . . . and agricultural waste discharged into water." § 1362(6); App., *infra*, 211. "Fill material" has been held to mean material used for the "primary purpose" of replacing an aquatic area with dry land or changing the bottom elevation of a water body. *Resource Invs. v. U.S. Army Corps of Eng'rs.*, 151 F.3d 1162, 1168 (9th Cir. 1998); *National Mining, supra*, at 145 F.3d at 1402, fn. 1. A "point source" is defined as "any discernible, *confined and discrete conveyance*, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. . . . " § 1362(14); App., *infra*, 212, emph. added.

The relevant "navigable waters" or "waters of the United States" on the semi-arid Borden Ranch are widely dispersed seasonal drainage swales and intermittent drainages – shallow linear features ranging from several inches to several feet wide, and up to several hundred feet long – which exist and carry stormwater runoff for brief periods only during and after seasonal rains, and which ultimately drain to intermittent streams, which themselves ultimately flow to tributaries of navigable waters. App., *infra*, 2; ER1011-12.[3] "Navigable waters" under the Act include wetlands *adjacent to* rivers, streams and more conventionally identifiable "waters", *National Mining, supra*, 145 F.3d at 1401, citing *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131-32 & n. 8 (1985), but not isolated *intrastate* waters. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs.*

[3] As cited herein, "ER" is the "Excerpts of Record" from the Ninth Circuit's proceedings, "CR" is the Court Record, taken from the district court's Docketing Sheet, and "TE" is a district court Trial Exhibit.

("SWANCC"), 531 U.S. 159, 167-174 (2001); *United States v. Wilson*, 133 F.3d 251, 257 (4th Cir. 1997). The Corps defines wetlands as areas "inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." *National Mining, supra*, 145 F.3d at 1401-1402.

2. The CWA's Farmer Exemptions

In 1977, Congress amended Section 404, adding "farmer exemptions" to clarify "that certain discharges, such as those associated with farming, silviculture, and ranching activities, are not prohibited or otherwise subject to regulation under § 404." *In re Carsten*, 211 B.R. 719, 731 (Bkrtcy. D. Mont. 1997). As amended, Section 404 *exempts* any "discharge":

> (A) *from normal farming*, silviculture, *and ranching activities such as plowing*, seeding, cultivating, minor drainage, harvesting *for the production of food, fiber, and forest products, or upland soil and water conservation practices;*. . . .

33 U.S.C. § 1344(f)(1)(A); App., *infra*, 210, emph. added.

Section 1344(f)(2)'s textually narrow "recapture" exception to these "farmer exemptions" requires a permit for:

> Any discharge of dredged or fill material into the navigable waters ***incidental*** *to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject*, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced. . . .

§ 1344(f)(2); App., *infra*, 211, emph. added.

The legislative history of the 1977 CWA "farmer exemptions" must be used to determine Congress' intent and provide context. *Harrison v. Northern Trust Co.*, 317

U.S. 476, 479 (1943); *Tidewater Oil Co. v. United States*, 409 U.S. 151, 157 (1972). The CWA farmer exemptions evince Congress "emphatically did not want the law to impede these bucolic pursuits." *National Mining, supra*, 145 F.3d at 1405.

The EPA and Army Corps expressly interpret the CWA to exempt plowing ranchland to plant crops in their regulations defining "plowing" as:

> . . . all forms of primary tillage, including moldboard, chisel, or wide-blade plowing, disking, harrowing, and similar physical means utilized on farm, forest or ranch land for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops. . . . *Plowing, as described above, will never involve a discharge of dredged or fill material.*

App., *infra*, 216; see *id.* at 218.

3. The Penalty Provision

As applied here, 33 U.S.C. Section 1319(d), App., *infra*, 209, authorizes civil penalties "not to exceed $25,000 per day for each violation" for discharging pollutants without a permit.

* * *

Petitioners challenge the Corps' assertion of federal permitting jurisdiction over the plowing of ranchland to plant crops in this case as in violation of CWA Section 404's jurisdictional limitations requiring a "discharge" of "pollutants" from a "point source," as well as its express exemption for "normal farming . . . and ranching activities such as plowing." Should this Court determine the Corps has Section 404 jurisdiction over plowing ranchland which is farmable in its natural state to plant crops, Petitioners challenge the lower courts' imposition of the maximum $25,000 penalty for each time a plow crossed a seasonal drainage feature, without regard to the number

of days on which such activity occurred, as violating Section 1319(d).

B. Petitioners' Plowing Activities On Borden Ranch and the Corps' Assertion of Jurisdiction

The 8,400-acre Borden Ranch is all agriculturally-zoned, Central Valley land, in both Sacramento and San Joaquin Counties, and is bisected by Dry Creek, the County Line. Presently owned by Borden Ranch Partnership ("BRP") (Tsakopoulos is managing partner and title holder) and its vendees, the Ranch has historically been used for cattle grazing, irrigated pasture, and growing wheat, hay, alfalfa, and row crops. Since late 1993, portions have been deep plowed and planted to vineyards and orchards. The Ranch contains seasonal hydrological features such as vernal pools, and swales and intermittent drainages (both hereinafter "drainages"). ER1011-12; App., *infra*, 2-3.

The Corps asserted CWA jurisdiction over the Ranch's drainages and vernal pools as "navigable waters" and contended that deep plowing, also known as "deep ripping" or "deep slip plowing," rangeland in delineated "waters" discharges *dredged or fill material* and requires a Section 404 permit. CR189, ER1013-1015; App., *infra*, 3.

Despite the Act and regulations, which exempt all forms of plowing, the Corps and EPA first distinguished deep plowing from shallower plowing. The Corps contended plowing in seasonal wetlands to "root zone depth," including disking, is not regulated but that deep plowing is. The Corps and EPA contended deep plowing would adversely affect "navigable waters" by puncturing restrictive subsurface soil layers believed integral to their inundation and functioning. TE30, ER13-15, 20-21, TE31, App. *infra*, 2-3. Relying on the Corps' oral and written advice, Tsakopoulos tried to plow in ways the Corps told him would not require CWA permits. CR204, ER921:8-16.

The Corps sought guidance from EPA in 1994 as to whether the CWA's farmer exemptions applied to Tsakopoulos' deep plowing. TE21, ER7. EPA confirmed the Corps' jurisdiction, and the Corps in late 1994 again distinguished deep plowing (prohibited without a permit) from shallow plowing at root zone depth, which it conceded was authorized under the exemptions without a permit and which one Corps regulator testified was 18 to 24 inches into the soil. TE30, ER13, CR204, ER910:18 – 911:2. Tsakopoulos authorized further plowing under the Corps' guidance until the winter rainy season, when it is not possible to plow once the ground becomes wet. CR204, ER909:3-6, CR226, ER981-983.

In 1995, Corps and Federal Natural Resources Conservation Service ("NRCS") officials met at the Ranch to discuss Tsakopoulos' plowing plans. NRCS advised deep-ripping through drainages had no hydrological impact and was a good farm management practice. CR204, ER915:11-20. The Corps continued to assert jurisdiction over deep plowing, but told Tsakopoulos orally and in writing he could deep rip uplands and cross areas delineated as "waters/wetlands" with the deep plow provided he raised the shank as high as possible even though it would still drag across and cut into the ground to some extent. TE31, ER20, TE558, ER16; see App., *infra*, 3. Tsakopoulos attempted to comply in authorizing additional 1995 plowing in Sacramento County. CR204, ER921:8-16. The Corps and EPA later claimed noncompliance and issued a November 1995 cease and desist order. App., *infra*, 3; TE50, ER30. Without conceding wrongdoing, Tsakopoulos settled the alleged 1995 plowing violations by dedicating a 1418-acre seasonal wetlands preserve (with 1368 contiguous acres) in May 1996. App., *infra*, 3-4, 165, 176; TE66, ER33, TE592, ER65.

In September 1996, Corps and EPA officials provided guidance for 1996 plowing on the Ranch's San Joaquin side, and reconfirmed that without a permit Tsakopoulos

could "deep plow" uplands and cross drainages with the plow shank raised. CR204, ER922-926. Tsakopoulos again attempted to comply in 1996 plowing, TE617, ER96, TE615, ER88, CR227, ER994-995, CR226, ER984-987, which plowing ended before December 1996. TE78, 80, 83, 85, 88, ER90, 97, 133, 148, 158.

The Corps' *first* official public guidance distinguishing "deep ripping" from other plowing was a December 12, 1996 Regulatory Guidance Letter ("RGL"). App., *infra*, 4, 199-207. The RGL came only after dedication of the preserve and after all plowing operations later found to be CWA violations had already occurred, App., *infra*, 103; CR189, ER1043:12-15; TE78, 80, 83, 85, 88; ER90, 97, 133, 148, 158, see CR204, ER909.

After the 1996-1997 rainy season, BRP resumed plowing (disking) in San Joaquin, and almost immediately EPA representatives unaware of the September 1996 guidance descended on the site, saw shallow furrows through some drainages (from *raised* deep plow shanks in 1996 plowing), and claimed some vernal pools were "clipped." CR226, ER970:17-973:23; App., *infra*, 4. Ignoring concerns expressed by EPA's Washington headquarters that deep plowing might not produce jurisdictional discharges in light of the D.C. district court's then-recent *American Mining* decision (affirmed on appeal in 1998 as *National Mining*), TE630, ER309, EPA Region 9 took an aggressive enforcement position and issued an April 1997 cease and desist order stopping all Ranch activity involving machinery crossing drainages. TE103, ER313; App., *infra*, 4.

C. Petitioners' Challenge To The Corps' Jurisdiction Over Plowing And The District Court's Ruling

Petitioners filed their Complaint May 6, 1997, for declaratory relief and to challenge Government regulations and the RGL. CR1, ER328. On August 6, the Government answered and counterclaimed alleging CWA

violations by "filling waters of the United States" on four Borden Ranch San Joaquin County parcels. CR7, ER385; App., *infra*, 4. By August 3, 1998 order, App., *infra*, 28-56, the district court denied Tsakopoulos' summary judgment motion, and partially granted and denied the Government's motion, leaving for trial the Counterclaim issues concerning alleged CWA violations. CR74, ER500-526; App., *infra*, 4-5. At the bench trial, from August 24 through September 16, 1999, App., *infra*, 5, the U.S. claimed Tsakopoulos' deep plowing in San Joaquin deposited "fill" into jurisdictional "waters" including drainages and pools.

Tsakopoulos disputed these claims and contended he *had* followed the Government's guidance by lifting the ripper shank to uppermost position when crossing drainages, resulting only in concededly unregulated shallow plowing. He also contended the six tiny pools allegedly filled were not jurisdictional "waters" within the Government's Commerce Clause power to regulate, since they were wholly isolated and not hydrologically connected to navigable waters, and were not actual migratory bird or endangered species habitat.

On November 8, 1999, the district court entered its 50-page Findings of Fact and Conclusions of Law. App., *infra*, 67-121, finding 348 separate deep plowing violations in 29 widely dispersed drainages (aggregating "about 2 acres" in total area) and 10 violations in a single 150 square foot vernal pool – the only one of six pools it found to be a jurisdictional water. App., *infra*, 5, 91, 98, 103, 105, 109; ER1030-1032. Despite Tsakopoulos' acknowledged efforts to follow the Corps' guidance, App., *infra*, 143-144, and the tiny area of alleged violations in comparison to the size of the Ranch area plowed and the area of wetlands/waters wholly avoided, App., *infra*, 105, 109, the court imposed a *$1.5 million* civil penalty. App., *infra*, 5, 118. On February 10, 2000, the court denied without hearing Tsakopoulos' Motion for

More Specific Findings as to the actual depth of the plowing violations it had found. App., *infra*, 5, 122-126. On March 3, 2000, final judgment was entered. App., *infra*, 127-134. Petitioners timely appealed on March 28, 2000. App., *infra*, 5; CR220, ER1092.

D. The Ninth Circuit's Decision

The Ninth Circuit affirmed the district court's decision in most respects in a 2-1 panel decision, the majority holding, over Judge Gould's dissent, that Petitioners' deep plowing of historical ranchland is regulated under CWA Section 404, App., *infra*, 210, which governs "discharges" of "pollutants," including "dredged or fill material," from "point sources" into "navigable waters." App., *infra*, 6-8.

The panel majority reasoned this case was like *Rybachek v. United States EPA*, 904 F.2d 1276 (9th Cir. 1990), which held *placer mining*, i.e., extracting raw materials from a stream, processing them to remove gold, and later returning the mining overburden to the stream at a distance from the original location, constituted "addition" of a "pollutant" and hence a Section 404 "discharge." It also relied on *United States v. Deaton*, 209 F.3d 331 (4th Cir. 2000), which held "sidecasting" materials from the digging with a backhoe of a 1240-foot drainage ditch to drain wetlands for the purpose of *residential subdivision construction* produced a regulated "discharge." App., *infra*, 6-8. It rejected Petitioners' argument that purely deep plowing to prepare land for new crops is wholly unlike those unrelated activities and even less like an "addition" of pollutants than the "incidental fallback" the D.C. Circuit in *National Mining*, *supra*, 145 F.3d 1399 held unregulated under Section 404. It distinguished *National Mining* in cursory fashion in a footnote, stating that deep plowing "does not involve mere incidental fallback, but constitutes environmental damage sufficient to constitute a regulable redeposit." App., *infra*, 8, fn. 2.

Rejecting Petitioners' argument that plows are not "discernible, confined and discrete conveyance[s]" so as to constitute "point sources" under 33 U.S.C. Section 1326(14), the Ninth Circuit relied on a Fifth Circuit case holding "bulldozers and backhoes" *can* constitute "point sources" where they are not merely plowing to plant crops but performing *earthmoving, excavation and ditching activities* with engaged blades and shovels to dry out water bodies. App., *infra*, 8-9; *see Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 901, 920-921, 926-927 (5th Cir. 1983). The court reached this conclusion notwithstanding the undisputed fact that the bulldozers and tractors (not backhoes) pulling deep plows on Borden Ranch were not engaged in any such grading, excavation or ditching, and were simply performing a normal farming operation by using their motive power to drag normal farming implements – deep plow shanks – through soil to prepare it for the planting of deeper rooted crops. App., *infra*, 2-3.

The Ninth Circuit also rejected Petitioners' argument that even if deep plowing could somehow constitute a "point source" "discharge" it was exempt from regulation (and not recaptured) under the CWA's farmer exemptions for "normal farming . . . and ranching activities such as plowing[.]" App., *infra*, 210; *National Mining, supra*, 145 F.3d at 1405; *see* App., *infra*, 9-10.

Finally, in affirming the $1.5 million civil penalty, the Ninth Circuit panel majority ignored conflicting authority from the Fourth and Eleventh Circuit courts, and a published Ninth Circuit district court decision, in interpreting 33 U.S.C. Section 1319, App., *infra*, 209, to allow assessment of the maximum daily penalty for each time a plow shank crossed a drainage without regard to the number of days on which the activity occurred. App., *infra*, 13-16.

Dissenting Judge Gould found *Rybachek* and *Deaton* readily distinguishable and would have held plows are

not "point sources," App., *infra*, 22, and "that the return of soil in place after deep plowing" does not produce a regulated "discharge" under *National Mining, supra*, 145 F.3d 1399, App., *infra*, 18, because "deep ripping does not involve any significant removal or 'addition' of material to the site." *App., infra*, 19; see App., *infra*, 18-22. He would have held the "farmer exemptions" applicable to "deep plowing" even assuming, arguendo, that it produced regulated "discharges." App., *infra*, 21. Judge Gould stated the "crux of this case is that a farmer has plowed deeply to improve his farm property to permit farming of fruit crops . . . more profitable than grazing" and that farmers have engaged in such agricultural pursuits "from the beginning of our nation, and indeed in colonial times." App., *infra*, 18. In Judge Gould's view, the majority acted without clear or express Congressional direction, and beyond Congress' intent under the CWA, in prohibiting "a traditional form of farming activity." App., *infra*, 20, 22. Judge Gould states the majority opinion "makes new law by concluding that a plow is a point source and that deep ripping includes discharge of pollutants into protected waters," and concludes that "the judicial determination that a deep plowing technique constitutes a pollution of navigable waters, with no prior adequate guidance from Congress, goes beyond mere statutory interpretation." According to Judge Gould, the majority's holding rests on "an agency power too unbounded or judicial law making, which is worse." App., *infra*, 22.

REASONS FOR GRANTING THE PETITION

This Court should grant review because the circuits are split over the fundamental jurisdictional reach of CWA Section 404 as it pertains to "incidental fallback," and because the Ninth Circuit's decision erroneously interprets several key elements of the statute resulting in expansive, intrusive and overreaching Federal regulatory

jurisdiction over normal farming activities, such as plowing, *which Congress emphatically never intended to regulate at all under the CWA*. *National Mining*, *supra*, 145 F.3d at 1405. As underscored by Judge Gould's dissent, App., *infra*, 18-22, the majority's decision ignores Congressional intent, eviscerates the Act's jurisdictional requirements and farmer exemptions, and substantially alters "the federal-state framework by permitting federal encroachment upon a traditional state power" *SWANCC*, *supra*, 531 U.S. at 173-174 , namely, the traditional state and local government authority to regulate the use of land for farming and agricultural activities.

I. THE CIRCUITS ARE SPLIT OVER THE CORPS' AUTHORITY TO REGULATE "INCIDENTAL FALLBACK" AS A POINT SOURCE DISCHARGE OF POLLUTANTS UNDER THE CWA

"Section 404(a) grants the Corps authority to issue permits 'for the discharge of dredged or fill material into the navigable waters at specified disposal sites.' " *SWANCC*, *supra*, 531 U.S. at 163; App., *infra*, 210. "Discharge" is defined as "any addition of any pollutant to navigable waters from any point source." *National Mining*, *supra*, 145 F.3d at 1401; App., *infra*, 212. The issue whether "redeposit" of native materials removed from and then returned to jurisdictional waters in "substantially the same spot" – referred to as "fallback" or "incidental fallback", *National Mining*, *supra*, 145 F.3d at 1401, 1403 – is a regulated "discharge" has produced disagreements among the courts of appeals.

The Fourth Circuit in *National Mining* invalidated the Corps' and EPA's so-called "Tulloch Rule," purporting to regulate any redeposit from any excavation activities, and held: (1) "the straightforward statutory term 'addition' cannot reasonably be said to encompass the situation in which material is removed from the waters of the United States and a small portion of it happens to fall back,"

National Mining, *supra*, 145 F.3d at 1404; and (2) such "incidental fallback" (which occurs when material is dredged from a water, and some of it falls back off the dredge bucket into the same general location) is not an "addition" and thus not a regulated "discharge." *Id.* at 1403. *National Mining* distinguished *Rybachek v. EPA*, 904 F.2d 1276 (9th Cir. 1990) – which it found was "the strongest authority for the agencies' position," *National Mining*, *supra*, 145 F.3d at 1406 – as involving a regulable discharge which was the "discrete act of dumping leftover material into the stream after it had been processed" rather than the "incidental fallback of dirt and gravel" to its original location. *Id.*, at 1406. The statute's use of the word "addition," as well as the phrase "specified disposal sites," shows "that Congress had in mind either a temporal or geographic separation between excavation and disposal which simply does not fit incidental fallback." *Id.*, at 1410, Silberman, J., concurring.

The Ninth Circuit gave short shrift to *National Mining*, rejecting it in a three-sentence footnote and following *Rybachek*, *supra*, 904 F.2d 1276 (9th Cir. 1990), which held *placer mining* operations extracting, processing and redepositing raw materials in a stream at considerable distance from the original location, constituted "addition" of a "pollutant." App., *infra*, 6. While *Rybachek* held return of extracted, processed mining overburden was addition of pollutants even though the overburden originated from the riverbed, the regulable "discharge" or "addition" was the discrete act of dumping the leftover material into the stream *after it had been extracted, collected and processed*. App., *infra*, 6; Rybachek, *supra*, 904 F.2d at 1285. The majority purports to follow *Rybachek* in holding the instantaneous turning in place by a plow of unextracted, uncollected and unprocessed native soil constitutes "addition" of a pollutant. App., *infra*, 8. This is, as Judge Gould stated in dissent, "incremental judicial reasoning" by which the majority extends *Rybachek* – and

Section 404 – to an entirely different context where it is simply inapposite. App., *infra*, 22.

The Ninth Circuit's rejection of *National Mining* was mistaken. Contrary to the majority's reasoning in its footnote attempting to distinguish *National Mining*, the distinction between "regulable redeposit" and unregulated "incidental fallback" depends on the existence of the jurisdictional prerequisite of an *addition* of material, not upon whether the involved activity supposedly "constitutes environmental damage sufficient to constitute a regulable redeposit." Compare App., *infra*, 8, fn. 2 with *National Mining, supra*, 145 F.3d at 1402-1403. Nowhere does the Ninth Circuit cite CWA or other authority for a standard it apparently created of whole cloth.

Unlike regulated "point source" discharges, plowing does not extract, hold, collect or remove native materials such that "redeposit" could occur. Even "incidental fallback" could not occur from any significant distance. Plows cut through, break up and turn soil in place while *adding nothing* and *redepositing nothing* from any collecting bucket, container, shovel, blade or other "confined" or "discrete conveyance" designed to hold or redistribute material. As Judge Gould stated, "[b]ecause deep ripping does not move any material to a substantially different geographic location and does not process such material for any period of time, *Rybachek* is not controlling." App., *infra*, 20. Judge Gould recognized *National Mining* could not be distinguished and should control because plowing produces, at most, "incidental fallback" of native soil which cannot be held to be a "discharge." He also recognized plows are not "point sources." App., *infra*, 22.

It is supremely ironic and significant that the Corps and EPA themselves argued in *National Mining* that *plowing*, among other exempt farming activities, *produced nothing more than "incidental fallback"* in an effort to convince the D.C. Court of Appeals in that case that such fallback was regulated; the agencies reasoned that Congress must

have considered the "incidental fallback" from these activities to be a regulated "discharge" or it would not have needed to include an exemption in the Act. *National Mining, supra*, 145 F.3d at 1405. In response to this argument, the *National Mining* Court stated:

> We find the exemptions far less telling. Some of the named activities – plowing, ditch maintenance, and the like – may produce fallback, but they may also produce actual discharges, i.e., addition of pollutants, so that § 404(f) accomplishes a useful purpose simply by exempting them insofar as they produce the latter. . . . [W]e are reluctant to draw any inference other than that Congress emphatically did not want the law to impede these bucolic pursuits.

National Mining, supra, 145 F.3d at 1405.

The Ninth Circuit's decision also conflicts with applicable Corps regulations, as interpreted by *National Mining* and its own previous decision, in holding native soil turned in place by a plow constitutes "fill" material, because the "primary purpose" of plowing is to enhance and revitalize farming soil, "not to replace an aquatic area with dry land or to change the bottom elevation of a water body[.]" *See Resource Invs., supra*, 151 F.3d at 1168 (9th Cir. 1998) (holding solid waste landfill leak detection and collection system placed in wetlands were not "fill material" under "primary purpose" test); *National Mining, supra*, 145 F.3d at 1401, fn. 1 (noting "primary purpose" requirement for defining "fill material").

Had petitioners' plowing occurred in the D.C. Circuit, the result in this case would have been different – under *National Mining* deep plowing would not be held a "discharge" subject to Section 404's permit requirements. In the Ninth Circuit, under *Borden Ranch*, it is. These issues are of national significance and fundamental importance to the farming, ranching and mining industries, as underscored by amici briefs and participation of

California Farm Bureau Federation, California Cattlemen's Association, California Mining Association and Pacific Legal Foundation, in support of Petitioners below and on appeal. The existence of Federal CWA Section 404 jurisdiction over "incidental fallback" from normal farming activities, such as plowing, should not depend on the happenstance of a farm's or ranch's location. Farmers and ranchers throughout the nation are entitled to equal treatment under the CWA, and the need for national uniformity is particularly great because farming activity completely unregulated in one jurisdiction could result in a multi-million dollar fines – or even criminal liability – if conducted in another. This case's exceptional importance warrants the granting of certiorari.

II. THE NINTH CIRCUIT ERRED IN HOLDING PLOWS ARE "POINT SOURCES"

An essential element of CWA Section 404 permitting jurisdiction is that the "pollutant" be "discharged" or "added" by a "**point source**," defined as "any discernible, confined and discrete conveyance." App., *infra*, 212. Regulation of potential sources of non-point source pollution is generally left to the States. E.g., 33 U.S.C. § 1288(b)(2)(F); see S. Rep. No. 95-370, at 76 (1977), reprinted in 1977 U.S.C.C.A.N. 4326, 4401 (normal farming activities to be regulated as non-point sources by State and local agencies). A plow is not a "point source," i.e., a "confined and discrete conveyance," since it is neither "confined" nor a "container," nor does it function as a "conveyance" of pollutants/materials from one location to another. No prior case has ever held a plow is a "point source."

The Ninth Circuit's reliance on a Fifth Circuit case finding "bulldozers and backhoes" *can* constitute "point sources" is misplaced since there the bulldozers and backhoes were not used for merely plowing (by pulling plow shanks) but for entirely different purposes and

activities including performing earthmoving, excavation and ditching functions with engaged blades and shovels. *Avoyelles Sportsmen's League, Inc. v. Marsh, supra*, 715 F.2d at 901, 920-921, 926-927. In *Avoyelles*, the owner of a 20,000-acre tract leveled the property, cut down timber and vegetation with bulldozers with shearing blades, pushed, burned, raked and disked all these materials into the land's low spots to raise and level it, and further dug a drainage ditch, for the express purpose of filling and drying out a swampy Louisiana flood plain so that it could *thereafter* be farmed for soybeans. *Id.*, at passim, 926. The bulldozers and tractors (not backhoes) pulling deep plows on the semi-arid Borden Ranch were indisputably *not* engaged in any such grading, excavation or ditching, and were simply using their motive power to drag normal farming implements – deep plow shanks – through the soil to break it up, and turn it in place, i.e., *to plow*. Neither *Avoyelles* nor any other reported decision, until *Borden Ranch*, holds that *plowing alone* produces a "point source" discharge.

The issue is critical to the nation's farmers and not limited to deep plowing, as the agencies are now going beyond even their own unauthorized December 12, 1996 RGL and attempting to regulate even the *shallowest* forms of plowing – including disking – under the authority of the *Borden Ranch* decision. See, e.g., App., *infra*, 41, 48 (district court summary judgment order finds *both* deep ripping *and* disking are regulated).

III. THE NINTH CIRCUIT ERRED IN HOLDING THAT PLOWING RANCHLAND TO PLANT CROPS IS A "CHANGE IN USE" NEGATING THE CWA'S INTENDED BROAD EXEMPTION OF PLOWING AS A "NORMAL FARMING ACTIVITY"

It is wholly unnecessary to reach the issue of interpretation of the CWA's farmer exemptions if the Court

concludes that deep plowing produces no regulated point source "discharge" so as to fall under the Corps' CWA Section 404 permitting jurisdiction. Congress' 1977 CWA amendments were intended to *prevent regulatory overreaching* and make clear that *no permit is required in any event* for any alleged "discharge," i.e., "addition" of a pollutant:

> (A) *from **normal farming***, silviculture, ***and ranching activities such as plowing***, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;. . . .

App., *infra*, 210.

Congress provided a narrow "recapture" provision removing from the exemption:

> Any discharge of dredged or fill material into the navigable waters ***incidental*** *to any activity having as its purpose bringing an area of the navigable waters into a use* ***to which it was not previously subject***, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced.

App., *infra*, 211, emph. added. This exception is not concerned with any "discharges" from the isolated activity of plowing productive farm or ranchland in its natural state, or with changes in agricultural use, such as from pasture and forage crop to orchard/vineyard crop. Rather, it addresses *intentional conversion of unproductive wetlands to drylands on a significant scale* to *enable* normal farming activities *which could not otherwise occur. In re Carsten, supra*, 211 B.R. at 735.

Thus, where activities are done for the primary purpose of draining and drying out significant water bodies to convert them to farmable uplands – i.e., the *Avoyelles* situation – the exemption cannot be claimed on the grounds that otherwise unregulated farming activities,

such as plowing, are later performed "incidental to," i.e., as a "minor concomitant," AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, NEW COLLEGE ED. (1975), p. 665, of the primary conversion project. This reasonable interpretation is compelled by the plain language of the "farmer exemptions", Congress' clear intent to meaningfully exempt normal farming activities from onerous federal regulation under the CWA's "point source" program, the lawful agency regulations expressly exempting all forms of plowing, and related statutes.[4]

The Ninth Circuit relied on the "recapture" provision as interpreted by *Avoyelles, supra*, 715 F.2d at 925, and another Ninth Circuit decision, *United States v. Akers*, 785 F.2d 814, 820 (9th Cir. 1986), to hold petitioners' deep plowing to plant vineyards and orchards was not exempt and was "recaptured" because it supposedly "radically altered the hydrological regime of protected wetlands." App., *infra*, 10. The Ninth Circuit confused the normal activity of converting from one agricultural crop to another with that of converting waters to uplands, and erroneously reasoned, that "[c]onverting ranch land to

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[4] For example, Congress subsequently enacted "Swampbuster" in the 1985 Food Security Act ("FSA"). Under the FSA "there will be liability for conversion of a wetland *if it is manipulated 'for the purpose or to have the effect of' making the land farmable." Downer v. U.S. By And Through Dept. of Agriculture*, 894 F.Supp. 1348, 1356 (D.S.D. 1995), emph. added, aff'd 97 F.3d 999 (8th Cir.). Statutes *in pari materia* are construed together. BLACK'S LAW DICTIONARY (5th ed. 1979), p. 711. "Wetlands" subject to being farmed by use of "normal cropping or ranching practices" (i.e., plowing) as a result of their "natural condition" (e.g., drought or, as here, regular dryness in a semi-arid region throughout the long growing season) are *not* deemed converted (i.e., brought into a use to which they were not already subject) when so farmed. *Merely* plowing (without more) thus triggers neither FSA farm subsidy ineligibility under "Swampbuster" *nor* CWA Section 404's recapture provision.

orchards and vineyards is clearly bringing the land into a use to which it was not previously subject . . . " *Id.* at 815. If this were true, then any change in agricultural crop or practice could subject plowing to federal regulation, and CWA Section 404's exemption for plowing ranchland to plant crops, App., *infra*, 218, would be rendered meaningless. Indeed, under the Ninth Circuit's interpretation, Section 404(f)(1) is a mere "grandfather" clause which would not apply at all to plowing historically ranched land for the first time either to improve the forage or to plant non-forage crops. The CWA's legislative history refutes this crabbed interpretation of the "farmer exemptions" and shows Congress never intended to regulate mere plowing at all under the CWA.

Senator Muskie, a primary CWA sponsor, *Avoyelles, supra*, 715 F.2d at 915, explained "the bill [adding farmer exemptions] tries to free from the threat of regulation those kinds of man made activities which are sufficiently de minimis as to merit general attention at the state and local level and little or no attention at the national level." Vol. 3, A LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1977 (1978) (hereafter "1977 LEG. HIST.") at 645 (CR36, ER489) (Senate Report on S. 1952, 95th Cong.); *see also id.* (*Vol.* 4) at 924 (ER 492) (Domenici comments); 181 (ER482) (President's comments); 289, 351, 524 (ER481, 483, 487) (Stafford comments). Where, as here, plowing is a permitted farming activity under locally-enacted agricultural zoning and other State and local regulations, Congress intended the federal government to have no role under the CWA.

During the December 15, 1977 Senate debate, Senator Muskie recognized the 1972 CWA's basic objective was "to eliminate toxic pollutants in toxic amounts" *id.*, 426, ER484, and stated of the "farmer exemptions":

> The conferees agree to adopt *the Senate amendment that legislatively clarifies the exclusion of certain activities that do not typically involve point source discharges of dredged or fill material . . . plowing, seeding, cultivating, harvesting, minor*

> *drainage, and soil and water conservation practices performed on uplands were not intended to require section 404 permits. . . .* [¶] *. . . While it is understood that some of these activities may necessarily result in incidental filling and minor harm to aquatic resources, the exemptions do not apply to discharges that convert extensive areas of water into dry land or impede circulation or reduce the reach or size of the water body.*

ER485, emph. added; *see also* 4 1977 LEG. HIST. at pp. 919-920 (ER490-491) (Chafee comments); *see* ER495, 493, 494. The legislative history shows Congress never intended to regulate pure plowing under the CWA and never even considered it to produce "discharges."

The implementing agency regulations accordingly exclude *all* plowing from CWA regulation. 33 CFR Section 323.2(f), for example, provides "fill" is *addition* of material and *never* includes plowing. EPA's regulations provide:

> ***Plowing means all forms of primary tillage, including moldboard, chisel, or wide-blade, disking, harrowing, and similar physical means used on farm, forest or ranch land for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops. . . .***
>
> ***Plowing, as described above, will never involve a discharge of dredged or fill material.***

App., *infra*, 218, emph. added.

Nor does the case law support the Ninth Circuit's unwarranted extension of Section 404 jurisdiction to purely farming activities. In *Akers*, the farmer purchased a 9,600 acre property which contained 2,889 acres of wetlands – known as the "Big Swamp" – on which he planned to "carry out extensive grading, leveling, drainage and water diversion to convert the wetlands to farmlands suitable for growing upland crops." *Akers, supra*, 785 F.2d at 816-817. Toward this end, he constructed a 3-mile long dike and 50-foot wide ditch to drain the

wetlands. *Id.* Based on Akers' *extensive dike building, grading, leveling and water diversion activities*, which were specifically designed to convert the marshy Big Swamp from non-farmable land into farmable land, the Ninth Circuit "affirm[ed] the injunction [against Akers] as a reasonable response *to the peculiar facts before [it].*" *Id.* at 820, emph. added. It did *not* endorse the Government's more extreme arguments, including arguments that "mere discing of soil" constituted a point source discharge of pollutants and that farmers required CWA permits to change from one wetland crop to another. *Id.* at 820; see *id.* at 819 (holding farmer exemptions inapplicable because court "cannot view Akers' plowing, discing and seeding in isolation" from other activities). *Akers* never held mere plowing of *already-farmable* land *alone* was regulated. Petitioners' plowing here *must* be viewed in isolation, because that is undisputedly how it occurred, on semi-arid ranchland already dry enough to plow and plant in its natural state. No case has ever held the Corps' CWA Section 404 jurisdiction extends to regulating *mere plowing* on land dry enough to farm in its natural state *without first undertaking extraordinary conversion activities*.

To the extent the Ninth Circuit unduly deferred to EPA's unauthorized application and interpretation of the CWA and its own regulations, its decision conflicts with this Court's *SWANCC* decision, which makes clear that the States retain traditional and primary power to regulate land and water use. *SWANCC, supra*, 531 U.S. at 174, citing *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994). As recognized by the CWA, farmers' and ranchers' agricultural land uses, including activities like plowing, are traditional matters of state and local, not federal, control. 33 U.S.C. §§ 1288, 1329; App., *infra*, 210, 212. Where administrative statutory interpretation is not only clearly erroneous but alters the federal-state framework by permitting federal encroachment on traditional state powers, courts do *not* apply the deferential standard

of *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *SWANCC, supra*, 531 U.S. at 173. Rather, in such cases, Congress must "convey its purpose clearly" or courts will deem it not to "have significantly changed the federal state balance." *Id., quoting United States v. Bass*, 404 U.S. 336, 349 (1971).

The Ninth Circuit's expansive definition of the terms "discharge," "addition," "point source" and "pollutant", and narrow interpretation of the farmer exemptions, so as to include the pure plowing done in this case within the Corps' CWA Section 404 jurisdiction, substantially expands federal power to an unprecedented extent at the expense of State and local authority. *SWANCC* forbids this absent Congress' clearly-expressed intent. As Judge Gould stated, "If Congress intends to prohibit so natural a farm activity as plowing, and even the deep plowing that occurred here, Congress can and should be explicit. Although we interpret the prohibition of the [CWA] to effectuate Congressional intent, it is an undue stretch for us absent a more clear directive from Congress, to reach and prohibit the plowing done here, which seems to be a traditional form of farming activity." App., *infra*, 19-20.

IV. THE NINTH CIRCUIT ERRED IN CALCULATING THE CIVIL PENALTY BY CALCULATING EACH PASS OF THE PLOW THROUGH WATERS, RATHER THAN EACH DAY OF PLOWING, AS A SEPARATE VIOLATION UNIT

If one assumes, solely *arguendo*, that plowing alone is a regulable activity under CWA Section 404, the Ninth Circuit nevertheless erred *as a matter of law* when it held the maximum CWA penalty was properly calculated by multiplying the *number of passes* the district court found were made by the plow, App., *infra*, 12-16, through each jurisdictional feature by the statutory dollar amount rather than multiplying the *number of days* during which

plowing "discharges" occurred in particular "waters" by the statutory dollar amount.

33 U.S.C. Section 1319(d), App., *infra*, 209, authorizes civil penalties "not to exceed $25,000 *per day for each violation*" against persons violating Section 1311(a) by discharging pollutants without a permit. This statute contemplates maximum penalties will be calculated not in terms of the total number of individual violations of the same type, but, rather, in terms of *daily violation units*. The "top-down" method of penalty assessment (employed here) involves calculating the maximum statutory penalty by first finding how many distinct *categories* of CWA violations occurred, and then finding the number of *days* during which each category occurred and multiplying the number of days by $25,000. *Chesapeake Bay Foundation v. Gwaltney of Smithfield*, 791 F.2d 304, 314 (4th Cir. 1986) vacated and remanded on other grounds, 484 U.S. 49 (§ 1319(d) speaks "in terms of penalties *per day* of violation, rather than *per violation.*"); *Atlantic States Legal Foundation v. Tyson Foods*, 897 F.2d 1128, 1139 (11th Cir. 1990) ("each *distinct* violation is subject to a separate *daily* penalty assessment of up to $25,000 . . . "); *Hawaii's Thousand Friends v. City and County of Honolulu*, 821 F.Supp. 1368, 1395 (D. Haw. 1993) (discussing top-down method of calculating number of categories and "*daily violations*" to arrive at maximum penalty).

The *Gwaltney* court rejected defendant's interpretation there as untenable because it impermissibly calculated the statutory maximum penalty *"per violation,"* rather than *"per day* of violation." *Gwaltney, supra*, 791 F.2d at 314. The Ninth Circuit and district courts here, too, read the words "per day" out of the statute and impermissibly divided daily soil discharges within a single category of violation into hundreds of separate violations. App., *infra*, 12-16. Under *Gwaltney*, Tsakopoulos' *maximum* penalty should have been limited to, at most, the *number of days* during which the same type of "point

source discharges" of soil actually occurred in particular waters. Counting as separate violation units the number of times a single point source (i.e., a plow shank) crossed a single jurisdictional feature during a single day impermissibly converts a single *daily* violation unit of the same activity into numerous sub-daily violation units and illegally establishes the maximum penalty "per violation, rather than per day of violation" – a result "inconsistent with the language of § 1319(d)." *Gwaltney, supra*, 791 F.2d at 314.

Where the "violation unit" is measured by less than a single day's period of time – for example, an "hourly maximum violation" occurring multiple times during the same day – the CWA limits the maximum penalty to *one day* for all such violations *if they are of the same type. United States v. Amoco Oil Co.*, 580 F.Supp. 1042, 1046, n. 1 (W.D. Mo. 1984), cited with approval by *Tyson Foods, supra*, 897 F.2d at 1138, 1138-1139 (holding Congress amended § 1319(d)'s language to its current "per day for each violation" to clarify the statute in accordance with *Amoco*'s interpretation).

Tsakopoulos' alleged violations *all* fell within the *single distinct category* of alleged discharge of a single "pollutant" – "fill" from native soil turned in place – from a "point source" without a permit. App., *infra*, 15. In performing its "top-down" analysis, the court should have added the number of *daily* violations of this category and multiplied that total by $25,000. *Hawaii's Thousand Friends, supra*, 821 F.Supp. at 1395. Despite extensive evidence introduced by the Government in the form of daily time records of the deep plow operators, the lower courts failed to engage in *any* analysis of the number of *days* on which such plowing occurred in either fall 1995 or fall 1996 on the Ranch's San Joaquin side, and never even *estimated* the number of daily violation units. CR189, ER1042-1043.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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BORDEN RANCH PARTNERSHIP; Angelo K. Tsakopoulos, Plaintiffs-Appellants,

v.

UNITED STATES ARMY CORPS OF ENGINEERS; United States Environmental Protection Agency, an agency of the United States, Defendants-Appellees.

No. 00-15700.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted July 9, 2001.

Filed Aug. 15, 2001

Arthur F. Coon (argued) and Edmund L. Regalia (argued), Miller, Starr & Regalia, Walnut Creek, California, for the plaintiffs-appellants.

Sylvia Quast (argued), U.S. Department of Justice, Environment and Natural Resources Division, Washington, D.C., for the defendants-appellees.

Appeal from the United States District Court for the Eastern District of California Garland E. Burrell, District Judge, Presiding. D.C. No. CV-97-00858-GEB (JFM).

Before: CANBY, HAWKINS, and GOULD, Circuit Judges.

MICHAEL DALY HAWKINS, Circuit Judge:

This appeal concerns the authority of the U.S. Army Corps of Engineers ("the Corps") and the Environmental Protection Agency ("EPA") over a form of agricultural activity called "deep ripping" when it occurs in wetlands. We conclude that the Clean Water Act applies to this

activity and affirm the district court's findings that Borden Ranch violated the Act by deep ripping in protected wetland swales. We reverse the district court's findings of liability with respect to isolated vernal pools in light of *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159, 121 S.Ct. 675, 148 L.Ed.2d 576 (2001), and remand for a recalculation of the civil penalties.

Facts and Procedural Background

In June of 1993, Angelo Tsakopoulos, a Sacramento real estate developer, purchased Borden Ranch, an 8400 acre ranch located in California's Central Valley. Prior to Tsakopoulos's purchase, the relevant areas of the ranch had been used primarily as rangeland for cattle grazing. The ranch contains significant hydrological features including vernal pools, swales, and intermittent drainages. Vernal pools are pools that form during the rainy season, but are often dry in the summer. Swales are sloped wetlands that allow for the movement of aquatic plant and animal life, and that filter water flows and minimize erosion. Intermittent drainages are streams that transport water during and after rains. All of these hydrological features depend upon a dense layer of soil, called a "restrictive layer" or "clay pan," which prevents surface water from penetrating deeply into the soil.

Tsakopoulos intended to convert the ranch into vineyards and orchards and subdivide it into smaller parcels for sale. Vineyards and orchards, however, require deep root systems, much deeper than the restrictive layer in the relevant portions of Borden Ranch permitted. For

vineyards and orchards to grow on this land, the restrictive layer of soil would first need to be penetrated. This requires a procedure known as "deep ripping," in which four- to seven-foot long metal prongs are dragged through the soil behind a tractor or a bulldozer. The ripper gouges through the restrictive layer, disgorging soil that is then dragged behind the ripper.

Under the Clean Water Act, an individual seeking to fill protected wetlands must first obtain a permit from the Corps. Since 1993, Tsakopoulos and the Corps have disagreed about the Corps' authority to regulate deep ripping in wetlands. Tsakopoulos initiated deep ripping without a permit in the fall of 1993, and the Corps granted him a retrospective permit in the spring of 1994, when Tsakopoulos agreed to various mitigation requirements. In the fall of 1994, the Corps and the EPA informed Tsakopoulos that he could deep rip in uplands and that he could drive over swales with the deep ripper in its uppermost position, but that he could not conduct any deep ripping activity in vernal pools. The next spring, the Corps discovered that deep ripping had occurred in protected wetlands and promptly issued a cease and desist order. From July 1995 through November 1995, Tsakopoulos again initiated deep ripping on various parcels of land without a permit. The Corps concluded that more protected wetlands had been ripped and again issued a cease and desist order.

In May of 1996, the Corps and the EPA entered into an Administrative Order on Consent with Tsakopoulos that was intended to resolve his alleged Clean Water Act violations. Under the agreement, Tsakopoulos set aside a

1368-acre preserve and agreed to refrain from further violations.

In December of 1996, the Corps and the EPA issued a regulatory guidance letter that distinguished deep ripping from normal plowing activity. The letter stated that deep-ripping in wetlands "destroy[s] the hydrological integrity of these wetlands" and therefore "requires a permit under the Clean Water Act."[1]

In March of 1997 the Corps concluded that Tsakopoulos had continued to deep rip wetlands without permission. That April, EPA investigators visited the ranch and observed fully engaged deep rippers passing over jurisdictional wetlands. EPA then issued an Administrative Order to Tsakopoulos.

Tsakopoulos responded by filing this lawsuit, challenging the authority of the Corps and the EPA to regulate deep ripping. The United States filed a counterclaim seeking injunctive relief and civil penalties for Tsakopoulos's alleged violations of the Clean Water Act.

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[1] In the district court, Tsakopoulos argued that this letter was invalid. The district court found that "it is unclear whether the regulatory guidance letter has actually been applied to Plaintiffs. Therefore decision is reached without reference to it." The district court also found that "any as-applied challenge to the regulations that might also include a challenge to the application of the [regulatory guidance letter] is not ripe."

On appeal, Tsakopoulos again challenges the regulatory guidance letter, arguing for the first time that the letter is a substantive rule that required notice-and-comment rule making. Since this new argument was not presented to the district court, we decline to consider it on appeal. *See Nelson v. City of Irvine*, 143 F.3d 1196, 1205-06 (9th Cir.1998).

Both parties filed motions for summary judgment. The district court ruled that the Corps has jurisdiction over deep ripping in jurisdictional waters. However, the court found disputed facts with respect to whether such deep ripping had actually occurred. These facts were litigated in a bench trial that began on August 24, 1999, and concluded on September 16, 1999. The district court heard evidence from over twenty witnesses and received hundreds of documentary exhibits.

The district court subsequently entered findings of fact and conclusions of law determining that Tsakopoulos had repeatedly violated the Clean Water Act. The court found 348 separate deep ripping violations in 29 drainages, and 10 violations in a single vernal pool. The district court gave Tsakopoulos the option of paying a $1.5 million penalty or paying $500,000 and restoring four acres of wetlands. Tsakopoulos chose the latter option. After denying a motion for more specific findings of fact, the district court entered its final order in favor of the United States.

Tsakopoulos then brought this timely appeal. We have jurisdiction under 28 U.S.C. § 1291.

Analysis

I. Corps Jurisdiction over Deep Ripping

The Clean Water Act prohibits "the discharge of any pollutant" into the nation's waters. 33 U.S.C. § 1311(a). The nation's waters have been interpreted to include wetlands adjacent to navigable waters. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133-35, 106

S.Ct. 455, 88 L.Ed.2d 419 (1985). The Act defines discharge as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). A point source is "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). A pollutant is defined, *inter alia*, as "dredged spoil, . . . biological materials, . . . rock, sand, [and] cellar dirt." 33 U.S.C. 1362(6). It is unlawful to discharge pollutants into wetlands without a permit from the Army Corps of Engineers. 33 U.S.C. § 1344(a),(d).

A. Discharge of a Pollutant

Tsakopoulos initially contends that deep ripping cannot constitute the "addition" of a "pollutant" into wetlands, because it simply churns up soil that is already there, placing it back basically where it came from. This argument is inconsistent with Ninth Circuit precedent and with case law from other circuits that squarely hold that redeposits of materials can constitute an "addition of a pollutant" under the Clean Water Act. *Rybachek v. United States Envtl. Prot. Agency*, 904 F.2d 1276 (9th Cir.1990), considered a claim that placer mining activities were exempt from the Act. We held that removing material from a stream bed, sifting out the gold, and returning the material to the stream bed was an "addition" of a "pollutant." *Id.* at 1285. The term "pollutant" encompassed "the materials segregated from gold in placer mining." *Id.*

Our reasoning in *Rybachek* is similar to that of the Fourth Circuit in *United States v. Deaton*, 209 F.3d 331 (4th

Cir.2000). In *Deaton*, a property owner alleged that the Corps could not regulate "sidecasting," which is "the deposit of dredged or excavated material from a wetland back into that same wetland." *Id.* at 334. The property owner asserted that "sidecasting results in no net increase in the amount of material present in the wetland" and therefore could not constitute the "addition of a pollutant." *Id.* at 335. The Fourth Circuit squarely rejected this argument, in language that is worth quoting in full:

> Contrary to what the Deatons suggest, the statute does not prohibit the addition of material; it prohibits the "addition of any pollutant." The idea that there could be an addition of a pollutant without an addition of material seems to us entirely unremarkable, at least when an activity transforms some material from a nonpollutant into a pollutant, as occurred here. . . . Once [earth and vegetable matter] was removed [from the wetland], that material became "dredged spoil," a statutory pollutant and a *type* of material that up until then was not present on the Deaton property. It is of no consequence that what is now dredged spoil was previously present on the same property in the less threatening form of dirt and vegetation in an undisturbed state. What is important is that once that material was excavated from the wetland, its redeposit in that same wetland *added* a pollutant where none had been before.

Id. at 335-36. As the court concluded, "Congress determined that plain dirt, once excavated from waters of the United States, could not be redeposited into those waters without causing harm to the environment." *Id.* at 336; *see also Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d

897, 923 (5th Cir.1983) (holding that the word "addition" may be reasonably understood to include "redeposit").

These cases recognize that activities that destroy the ecology of a wetland are not immune from the Clean Water Act merely because they do not involve the introduction of material brought in from somewhere else. In this case, the Corps alleges that Tsakopoulos has essentially poked a hole in the bottom of protected wetlands. That is, by ripping up the bottom layer of soil, the water that was trapped can now drain out. While it is true, that in so doing, no new material has been "added," a "pollutant" has certainly been "added." Prior to the deep ripping, the protective layer of soil was intact, holding the wetland in place. Afterwards, that soil was wrenched up, moved around, and redeposited somewhere else. We can see no meaningful distinction between this activity and the activities at issue in *Rybachek* and *Deaton*. We therefore conclude that deep ripping, when undertaken in the context at issue here, can constitute a discharge of a pollutant under the Clean Water Act.[2]

Tsakopoulos also contends that no case has ever held a plow to be a point source, and that a prohibited discharge must be from a point source. This argument has no merit. The statutory definition of "point source" ("any

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[2] *National Mining Assoc. v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399 (D.C.Cir.1998), upon which Tsakopoulos heavily relies, does not persuade us to the contrary. That case distinguished "regulable redeposits" from "incidental fallback." *Id.* at 1405. Here, the deep ripping does not involve mere incidental fallback, but constitutes environmental damage sufficient to constitute a regulable redeposit.

discernible, confined, and discrete conveyance") is extremely broad, 33 U.S.C. § 1362(14), and courts have found that "bulldozers and backhoes" can constitute "point sources," *Avoyelles*, 715 F.2d at 922. In this case, bulldozers and tractors were used to pull large metal prongs through the soil. We can think of no reason why this combination would not satisfy the definition of a "point source."

B. The Normal Farming Exception

Tsakopoulos next contends, that even if deep ripping constitutes a discharge of pollutants, it is nonetheless exempt from regulation under the "farming exceptions," which state that discharges "from normal farming . . . and ranching activities, such as plowing" are not subject to the Clean Water Act. 33 U.S.C. § 1344(f)(1)(A). The section of the statute containing the farming exceptions, however, includes a significant qualifying provision:

> Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

33 U.S.C. § 1344(f)(2). Thus, even normal plowing can be regulated under the Clean Water Act if it falls under this so-called "recapture" provision. *See Avoyelles*, 715 F.2d at 925 (noting that § 1344(f)(2) can preclude the normal farming exceptions).

We conclude that the deep ripping at issue in this case is governed by the recapture provision. Converting ranch land to orchards and vineyards is clearly bringing the land "into a use to which it was not previously subject," and there is a clear basis in this record to conclude that the destruction of the soil layer at issue here constitutes an impairment of the flow of nearby navigable waters.

Although the Corps cannot regulate a farmer who desires "merely to change from one wetland crop to another," activities that require "substantial hydrological alterations" require a permit. *United States v. Akers*, 785 F.2d 814, 820 (9th Cir.1986). As we have explained, "the intent of Congress in enacting the Act was to prevent conversion of wetlands to dry lands," and we have classified "as non-exempt those activities which change a wetland's hydrological regime." *Akers*, 785 F.2d at 822. In this case, Tsakopoulos's activities were not intended simply to substitute one wetland crop for another; rather they radically altered the hydrological regime of the protected wetlands. Accordingly, it was entirely proper for the Corps and the EPA to exercise jurisdiction over Tsakopoulos's activities.

II. The Vernal Pool

The district court found Clean Water Act violations in one isolated vernal pool on Tsakopoulos's property. Earlier this year, the Supreme Court ruled in *Solid Waste* that the Corps' rule extending the definition of "navigable waters" under the Clean Water Act to include intrastate waters used as habitat for migratory birds exceeds the

authority granted to the Corps under the Clean Water Act. The government now concedes that *Solid Waste* precludes Corps' authority over the vernal pool in dispute and has formally withdrawn its enforcement claim with respect to the pool. We accordingly reverse the district court's findings of Clean Water Act violations in the vernal pool.

III. The District Court's Factual Findings

Tsakopoulos challenges the district court's factual findings of violations of the Clean Water Act. We review for clear error. *Ambassador Hotel Co. v. Wei-Chuan Inv.*, 189 F.3d 1017, 1024 (9th Cir.1999).

Tsakopoulos argues that "there was no substantial evidence at all" to support the court's factual findings of deep ripping in protected swales. He argues that the evidence can only demonstrate shallow ripping consistent with the ripper in its uppermost position, which was permitted under the government's direction.

"Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Cree v. Flores*, 157 F.3d 762, 768 (9th Cir.1998). The district court here held a four-week bench trial, examined numerous exhibits, and heard over twenty witnesses. There is ample evidence to support the district court's findings. The court cited documentary evidence showing deep ripping, eyewitness testimony of deep ripping on the property, and Tsakopoulos's own concession that "mistakes had been made." The court also relied on the studies of Dr. Lyndon Lee, who conducted extensive investigations at the site. Dr. Lee was able to

dig soil pits as far as thirty inches into the soil. By examining the composition of the soil in these pits, Dr. Lee could determine whether the underlying clay layer had been ripped up, consistent with deep ripping. The district court chose to credit this evidence that deep ripping had occurred, and we can find no clear error on this record.

IV. The Civil Penalty

The district court found that Tsakopoulos had committed 358 violations of the Clean Water Act. It counted each pass of the ripper through a protected wetland as a separate violation. The statute provides for a maximum penalty of "$25,000 per day for each violation." 33 U.S.C. § 1319. The statutory maximum penalty was therefore $8,950,000. The court then considered a variety of factors in setting the penalty. The court found that Tsakopoulos "risked damaging rare federal wetlands because of his motivation to reap economic gain." The court also found an "absence of a good faith attempt to comply with the Act." The court accordingly set the penalty at $1,500,000, which is $7,450,000 below the statutory maximum. The court also allowed Tsakopoulos to suspend $1,000,000 of the penalty if he performed various restoration measures.

Tsakopoulos now makes three challenges to the district court's calculation of the civil penalty. We conclude that none of these arguments has merit.

A. Penalty Calculation per Violation

Tsakopoulos first contends that the penalty should have been based on the number of days in which illegal ripping occurred, not on the number of individual passes with the ripper. He argues that the statutory language "per day for each violation" means that he can only be assessed $25,000 for any day in which ripping violations occurred, regardless of the total number of rippings in that day.

We disagree. The statute imposes a maximum penalty "per day for each violation." 33 U.S.C. § 1319(d). It does not say "per each day in which violations occur" or "per day in which a party pollutes." The focus is clearly on *each* violation, and courts have consistently rejected attempts to limit civil penalties to the number of days in which violations occur. A contrary rule would encourage individuals to stack all their violations into one "Pollution Day," in which innumerable offenses could occur, subject only to the $25,000 maximum.

Tsakopoulos relies most heavily on *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 791 F.2d 304 (4th Cir.1986), *vacated*, 484 U.S. 49, 108 S.Ct. 376, 98 L.Ed.2d 306 (1987). In *Gwaltney*, the court considered a case of continuous violations of monthly permits. The violator argued that a monthly violation should be treated as a single day of violation. *Id.* at 313. The court disagreed, concluding "where a violation is defined in terms of a time period longer than a day, the maximum penalty assessable for that violation should be defined in terms of the number of days in that time period." *Id.* at 314. The

court explicitly declined to reach the very different question of "whether multiple violations attributable to a single day may give rise to a maximum penalty in excess of [the penalty amount] for that day." *Id.* at 308.

This question was addressed in *Atlantic States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128 (11th Cir.1990). The court found that the statutory provision was "not a model of clarity," but nonetheless found that it was "capable of only a single reasonable interpretation: the daily maximum penalty applies separately to each violation of an express limitation." *Id.* at 1137, 1138. The court stated that "*each* excessive discharge of a pollutant on a given day will subject the polluter to a $25,000 maximum fine." *Id.* at 1139. This interpretation was consistent with the legislative history, which stated that the provision was intended "to clarify that each distinct violation is subject to a separate daily penalty assessment." *Id.* (citation omitted).

The Fourth Circuit adopted similar reasoning in *United States v. Smithfield Foods, Inc.*, 191 F.3d 516, 528 (4th Cir.1999). The court noted the serious incentive problems of a contrary ruling: "[I]f the maximum penalty that could be levied against a violator on a single day was $25,000, no matter how many different Permit effluent limitations were violated, the permittee would have a strong disincentive to comply with the other permit limitations." *Id.* at 527-28. Accordingly, the court treated each permit violation "as a separate and distinct infraction for purposes of penalty calculation." *Id.* at 528.

We recognize that these cases do not precisely resolve the problem at issue here. These cases are concerned with

emission of different types of pollutants in violation of different permits. This case is about repeated filling of wetlands without a permit. Here, the landowner committed the same unlawful act repeatedly. Tsakopoulos argues that treating each rip as a separate violation could lead to nonsensical results in other cases. For example, a polluter who emitted 25,000 gallons of a pollutant into a stream continuously over the course of a day would be subject to a $25,000 maximum penalty, whereas a polluter who made three separate discharges of one gallon each would be subject to a $75,000 maximum penalty.

Tsakopoulos's position, however, also leads to irrational results. The incentive problems at issue in *Smithfield* are equally strong here. Once a wetland violation has occurred in part of a swale, Tsakopoulos's proposed rule would allow the landowner to rip away at the rest of the swale with impunity from that point forward, because no additional penalty could be imposed.

Although neither approach is free from difficulty, we believe the better rule is to treat each rip as a separate violation. This approach is more consistent with the statutory language, with prior judicial interpretations of the statute, and with the general policy goal of discouraging pollution. Tsakopoulos's concern about the disparate treatment of the polluter who emits several small amounts and the serial continuous polluter is not without remedy in the district courts. The district courts have substantial discretion in imposing penalties, and, as the *Gwaltney* court pointed out in response to a similar argument, the district court "could . . . impose a substantially smaller penalty on [the] hypothetical polluter than on [the larger polluter]." 791 F.2d at 315.

In sum, we conclude that the district court correctly included each pass of the ripper as a separate violation. A limited remand for recalculation of the penalty is nonetheless in order. The district court included 10 passes through the vernal pool in its total of 358 violations. Since the government now concedes that it lacks jurisdiction over these violations, we remand to the district court to determine what, if any, reduction in the penalty is appropriate.

B. The Simpson Timber Consent Decree

Tsakopoulos argues that the penalty imposed here is significantly disproportionate to the penalty imposed in the settlement of violations by the Simpson Timber Company, which deep ripped 987 acres, but was subject only to a $30,000 penalty and a restoration order. By contrast, Tsakopoulos committed violations on only two acres. The district court found that the Simpson Timber consent decree had no relevance to the determination of the civil penalty here, because consent decrees are different from judgments reached after extensive litigation and because that decree imposed significant restoration requirements.

The district court did not abuse its discretion. Tsakopoulos knowingly assumed the risk that litigation would result in a judgment more unfavorable than he might have attained through settlement. Having assumed that risk, Tsakopoulos cannot now be heard to complain that his penalty should have been assessed as if he had settled the case. In any event, the statute directs that these disputes be evaluated on a case-by-case basis. Since we know almost nothing about the facts of the Simpson

Timber dispute, it is impossible to conclude that the district court's careful analysis of the penalty issue on the facts of this case was an abuse of discretion.

C. Further Reductions in Penalty

Tsakopoulos finally argues that the district court should have reduced the penalty further because of Tsakopoulos's good faith, the trivial nature of the violations, and the supposed uncertainty concerning the government's regulatory authority. The district court considered these arguments when setting the penalty (a penalty that was significantly lower than the statutory maximum). None of Tsakopoulos's arguments rises to the level necessary to demonstrate an abuse of discretion by the district court.

Conclusion

We affirm the district court's holding that deep ripping in this context is subject to the jurisdiction of the Corps and the EPA. We also affirm the district court's factual findings except with respect to the vernal pools. We remand for a recalculation of the civil penalties. Finally, we deny Tsakopoulos's request that this case be assigned to a different district judge on remand.

AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART, AND REMANDED. Costs on appeal to appellees.

RONALD M. GOULD, Circuit Judge, dissenting:

I respectfully dissent. The crux of this case is that a farmer[1] has plowed deeply to improve his farm property to permit farming of fruit crops that require deep root systems, and are more profitable than grazing or other prior farm use. Farmers have been altering and transforming their crop land from the beginning of our nation, and indeed in colonial times. Although I have no doubt that Congress could have reached and regulated the farming activity challenged, that does not in itself show that Congress so exercised its power. I conclude that the Clean Water Act does not prohibit "deep ripping" in this setting.

I would follow and extend *National Mining Association v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C.Cir.1998), and hold that the return of soil in place after deep plowing is not a "discharge of a pollutant." In *National Mining*, the court held that the Corps exceeded its authority under section 404 of the Clean Water Act by

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[1] Appellant, Angelo Tsakopoulos, is referred to by the majority as a "real estate developer." As the owner of Borden Ranch, which apparently engaged in both farming and ranching activities, it seems to me correct to refer to him as a farmer or a rancher, in addition to being a developer. Whether viewed as a farmer, rancher, or developer, his rights as a citizen are the same. Because the challenged activities in this case arise on land previously used for rangeland for cattle grazing, and his deep ripping was converting the land for orchard and vineyard farming, I consider him as a farmer and rancher, and the issues raised by his position in this litigation may impact farmers and ranchers regardless of whether they plan to sell portions of improved land.

regulating the redeposit of dredged materials that incidentally fall back in the course of dredging operations. The court explained that "the straightforward statutory term 'addition' cannot reasonably be said to encompass the situation in which material is removed from the waters of the United States and a small portion of it happens to fall back." *Id.* at 1404. The court rejected the agencies' primary argument that incidental fallback constitutes an "addition" because once dredged the material becomes a pollutant:

> Regardless of any legal metamorphosis that may occur at the moment of dredging, we fail to see how there can be an addition of dredged material when there is no addition of material. Although the Act includes "dredged spoil" in its list of pollutants, Congress could not have contemplated that the attempted removal of 100 tons of that substance could constitute an addition simply because only 99 tons of it were actually taken away.

Id. at 1404 (emphasis omitted).

Those considerations are persuasive here as deep ripping does not involve any significant removal or "addition" of material to the site. The ground is plowed and transformed. It is true that the hydrological regime is modified, but Congress spoke in terms of discharge or addition of pollutants, not in terms of change of the hydrological nature of the soil. If Congress intends to prohibit so natural a farm activity as plowing, and even the deep plowing that occurred here, Congress can and should be explicit. Although we interpret the prohibitions of the Clean Water Act to effectuate Congressional intent,

it is an undue stretch for us, absent a more clear directive from Congress, to reach and prohibit the plowing done here, which seems to be a traditional form of farming activity.

Rybachek v. United States Environmental Protection Agency, 904 F.2d 1276 (9th Cir.1990), in my view, is distinguishable. In *Rybachek*, we held that placer mining, "a process in which miners excavate dirt and gravel in and around waterways and, after extracting the gold, discharge the leftover material back into the water," fell within the scope of section 404 of the Clean Water Act. *Id.* at 1285. There, the *Rybachek* court identified the regulable discharge as the discrete act of dumping *leftover* material into the stream after it had been processed. *Id.* As the concurrence in *National Mining* makes clear, however, "the word addition carries both a temporal and geographic ambiguity. If the material that would otherwise fall back were moved some distance away and then dropped, it very well might constitute an 'addition.' Or if it were held for some time and then dropped back in the same spot, it might also constitute an 'addition.' " *National Mining*, 145 F.3d at 1410 (*Silberman*, J., concurring). Because deep ripping does not move any material to a substantially different geographic location and does not process such material for any period of time, *Rybachek* is not controlling.

Nor is the Fourth Circuit's opinion in *United States v. Deaton*, 209 F.3d 331 (4th Cir.2000), relied on by the majority, persuasive to me in the context presented. A farmer who plows deeply is not, in my view, redepositing dredged or excavated materials. While the Fourth Circuit relied on the fact that a "dredged spoil" is a statutory

pollutant, the deep plowing activity here, in my view, is not the same as dredging dirt from and redepositing it in waters.

Also, even assuming that deep ripping can be viewed as a discharge of a pollutant into navigable waters, it seems at first consideration exempt as a normal farming activity. The Clean Water Act exempts normal farming activity, including plowing. *See* 33 U.S.C. § 1344(f)(1)(A). The exemption as cast by Congress is not limited to shallow plowing, but would appear literally to cover the deep plowing technique referred to as deep ripping.

This exemption, however, does not apply by its terms to "any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject." *See* 33 U.S.C. § 1344(f)(2). Moreover, the Corps of Engineers, by regulation, has provided explicitly that the plowing exemption does not include "redistribution of soil, rock, sand, or other surficial materials in a manner which changes any area of the waters of the United States to dry land." 33 C.F.R. § 323.4(a)(1)(iii)(D). The Corp's regulation, which we upheld in *United States v. Akers*, 785 F.2d 814, 819-20 (9th Cir.1986), must be read consistent with the statute's terms. Although this limitation defeats the exemption for any deep ripping that had the purpose of transforming land, it does not, in my view, defeat the exemption as to any *unintended* impairment. Most violations found by the district court involved a purposeful attempt to transform the land. But some of the transgressions (indentations in swales caused by moving the deep ripper to different locations) found by the district court here were apparently unintentional, or at least there was no finding by

the district court of purposeful modification as to all of the violations.

I would hold that the district court erred in finding that the activities here required a permit and otherwise violated the Clean Water Act. The problem of interpretation here arises because Congress prohibited the discharge or addition of any pollutant to navigable waters from any point source. It did not literally prohibit any conduct by farmers or ranchers that changes the hydrological character of their land. The majority opinion, motivated perhaps by the purposes of the statute, makes new law by concluding that a plow is a point source and that deep ripping includes discharge of pollutants into protected waters. The policy decision involved here should be made by Congress, which has the ability to study and the power to make such fine distinctions. I understand how the majority reaches its position based on *Rybachek*, and incremental judicial reasoning. Notwithstanding, the judicial determination that a deep plowing technique constitutes a pollution of navigable waters, with no prior adequate guidance from Congress, goes beyond mere statutory interpretation. It would be preferable for the public, the regulators, and us were Congress to speak explicitly on the subjects of what normal farming or ranching activities may include discharge of pollutants and require permits under the Clean Water Act, and whether it wishes to exempt any such activities and upon what terms. The alternatives are an agency power too unbounded or judicial law-making, which is worse. I respectfully dissent.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

BORDEN RANCH ASSOCIATES; ANGELO K. TSAKOPOULOS, Plaintiffs, v. U.S. ARMY CORPS OF ENGINEERS, an agency of the United States; and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, an agency of the United States, Defendants. AND RELATED CROSS-ACTION	Case No. CIV-S-97-858 GEB JFM (~~PROPOSED~~) JOINT STIPULATION AND PRELIMINARY INJUNCTION ORDER (Filed Oct. 20, 1997)

The United States of America, having filed a Counterclaim seeking injunctive relief and civil penalties under the Clean Water Act, and a Motion for Temporary Restraining Order and Preliminary Injunction against plaintiff and counterdefendant Angelo K. Tsakopoulos; the Court having on October 9, 1997, orally entered a Temporary Restraining Order against Tsakopoulos for, among other things, planned plowing and planting activities on already "deep-ripped" Borden Ranch parcels for land preparation and the planting of winter wheat and/or oat crops precluding any such activities from occurring within swales (or other jurisdictional waters of the United States) until a hearing on the United States' Motion for Preliminary Injunction could be had; Mr. Tsakopoulos having now determined, in light of the economics of the matter and the delay occasioned by the TRO, not to pursue said plowing operations in the swales; and Mr. Tsakopoulos accordingly having agreed to the entry of a preliminary injunction to preserve the status quo with respect to the Borden Ranch delineated waters and wetlands pending this Court's decision on the merits of this action,

IT IS HEREBY STIPULATED BY THE PARTIES AND ORDERED BY THE COURT that:

1. Pending the resolution of the parties' action, counterdefendant Angelo K. Tsakopoulos ("Tsakopoulos") shall not engage in any activities which the United States has contended result in the discharge of any dredged or fill material into those portions of Borden Ranch designated as waters of the United States by the jurisdictional delineation performed by Sugnet & Associates attached as Exhibit A hereto, except in those portions

of Borden Ranch where the discharge of dredged or fill materials has been authorized pursuant to a valid section 404 permit.

2. The prohibited activities in jurisdictional waters shall include, by way of example and not limitation, filling, dredging, deep plowing or deep ripping, discing, floating, levelling, grading, clearing land, and casting aside soil or other surface materials. This preliminary injunction does not enjoin Tsakopoulos from engaging in such activities *outside of* the delineated jurisdictional waters and wetlands. The United States reserves the right to take appropriate enforcement action against Mr. Tsakopoulos if such activities are in violation of other applicable laws and regulations.

3. Employees and authorized representatives (including contractors) of the United States Environmental Protection Agency ("EPA") and the United States Army Corps of Engineers (the "Corps") shall be permitted reasonable entry into that certain property owned by Tsakopoulos and more particularly identified in Exhibit "D" to Tsakopoulos' Complaint for Declaratory and Injunctive Relief in this action ("Borden Ranch"), upon reasonable written notice to Tsakopoulos of not less than 48 hours, for the purpose of monitoring compliance with this Order. As part of monitoring compliance, EPA or the Corps may take samples, measurements, photographs, and videotapes or otherwise record or document information regarding compliance with this Order. Any party to this Order may ask the Court to resolve any disputes regarding the reasonableness of notice or entry, or regarding compliance with this paragraph.

4. Tsakopoulos, his agents, servants, employees and assigns, and all persons in active concert or participation with them shall not unreasonably interfere in any manner with the implementation of this Order. Mr. Tsakopoulos reserves the right to file a motion with the Court for modification or dissolution of this Order at any time.

5. This Order shall be binding on Tsakopoulos, his agents, servants, employees and assigns, and all persons in active concert or participation with them. By stipulating to this Order, Mr. Tsakopoulos merely agrees to preserve the status quo as set forth herein, and makes no concession or admission as to the facts, theories or merits of this action.

IT IS SO STIPULATED.

Dated: 10/15, 1997

MILLER, STARR & REGALIA

By: /s/ Arthur F. Coon
Arthur F. Coon
Attorneys for Plaintiffs
BORDEN RANCH ASSOCIATES and ANGELO K. TSAKOPOULOS

Dated: October 15, 1997

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

By: /s/ Sylvia Quast
Sylvia Quast
Attorneys for Defendants and Counterclaimant

IT IS SO ORDERED.

Dated: October 20, 1997

/s/ Garland E. Burrell, Jr.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BORDEN RANCH PARTNERSHIP; ANGELO K. TSAKOPOULOS, Plaintiffs, v. UNITED STATES ARMY CORPS OF ENGINEERS, an Agency of the United States; and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, an Agency of the United States Defendants. AND RELATED CROSS-ACTION.	CIV-S-97-0858 GEB JFM AMENDED ORDER* (Filed Aug. 3, 1998)

Pending are the parties' cross-motion for summary judgment on Plaintiffs' challenge to Defendants' application of the Clean Water Act ("CWA" or "Act") to activities that Plaintiffs claim are not subject to regulation. For the reasons stated below, Plaintiffs' motion is denied and Defendants' motion is granted in part.

* Because text was inadvertently omitted from the order filed June 9, 1998, this amended order is hereby filed.

I.
BACKGROUND

Section 404 of the CWA[1] establishes a permit program to control the discharge of dredged and fill material. *See* 33 U.S.C. § 1344. Section 301 prohibits discharge of any pollutant without a permit into navigable waters of the United States. *See id.* at § 1311. Unpermitted discharges of dredged or fill material or pollutant may be enforced pursuant to section 309. *See id.* at § 1319.

Congress delegated Defendant United States Army Corps of Engineers ("Corps") the authority to issue section 404 permits. *See* 33 U.S.C. §§ 1344(a), 1344(d). While the Corps retains enforcement authority over permit conditions and limitations, Defendant Environmental Protection Agency ("EPA") has direct enforcement authority over unpermitted discharges in violation of section 301. *See* 33 U.S.C. §§ 1319, 1344. Both agencies are empowered to issue regulations and guidance documents and thus share in the administration of the Act. *See, e.g.*, 33 U.S.C. § 1344(b)(1).

At issue is whether Plaintiffs Borden Ranch Partnership and Angelo K. Tsakopoulos are required to obtain section 404 permits from the Corps before engaging in certain activities in "waters of the United States" on Borden Ranch. Plaintiffs argue they are entitled to plow these "waters" to plant orchards, vineyards, and other deep-root crops without obtaining a permit. They further contend that their deep slip plowing ("deep ripping")

[1] Unless otherwise indicated, all references to code sections pertain to the CWA.

and shallow plowing ("disking") in areas of normally dry but seasonally inundated "wetlands" constitute "normal" plowing and farming activities, which are specifically exempt from the permit requirements. Accordingly, Plaintiffs allege that Defendants have exceeded their delegated authority by arbitrarily and capriciously preparing and applying regulations to Plaintiffs' activities.[2] Defendants rejoin that Plaintiffs' deep ripping and disking activities are not exempt from section 404 permit requirements and that Plaintiffs have violated the CWA by placing fill, which alternatively constitutes pollutant, in protected waters without a permit. Defendants additionally argue that Plaintiffs' facial challenges to defendants' regulations are time-barred and that both Plaintiffs' due process and

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[2] In the Complaint, Plaintiffs pray for declaratory and injunctive relief from application of both Defendants' regulations and a Regulatory Guidance Letter ("RGL") issued by the Corps on December 12, 1996. *See* Compl. at 29-30. However, based on the factual record presented on the cross motions for summary judgment, it is unclear whether the RGL has actually been applied to Plaintiffs. Therefore, decision is reached without reference to it.

Furthermore, the ripeness of Plaintiffs' challenge to the RGL has not been established. *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 1998 WL 244192, at *5 (U.S. May 18, 1998). Therefore, any dispute regarding the RGL has not been shown to be justiciable. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967) (explaining that the ripeness requirement was designed "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties").

commerce clause challenges to the regulations lack merit.[3]

II.

ANALYSIS

A. Standard of Review

Summary judgment is appropriate where the record shows an absence of a genuine issue of material fact entitling the movant to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The movant has the initial burden of establishing the absence of genuine issues of material fact. Fed. R. Civ. P. 56(c). Once the movant has met its burden, the nonmovant must make a sufficient showing on matters on which it will have the burden of going forward with evidence at trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-87 (1986). "The inquiry involved in ruling on a motion for summary judgment . . . necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Thus, "[o]n cross motions for summary judgment, the burdens faced by the opposing parties vary with the burden of proof they will face at trial." *Cabo Distributing Co., Inc. v. Brady*, 821 F. Supp. 601, 607 (N.D. Cal. 1992).

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[3] Pacific Legal Foundation, California Farm Bureau Federation, and California Cattlemen's Association (collectively "PCC") and California Mining Association ("CMA") each filed amicus curiae briefs in support of Plaintiffs' motion for summary judgment. Both PCC and CMA principally contest Defendants' jurisdiction over "wetlands" on Borden Ranch.

When cross motions for summary judgment are filed, the ordinary implication is that no disputed issues of material fact exist and that the dispute may be decided as a matter of law. *A & A Concrete, Inc. v. White Mountain Apache Tribe*, 781 F.2d 1411, 1417, n.1 (9th Cir. 1986). Nevertheless, the Court must determine whether the parties have raised issues of material fact that make summary judgment inappropriate. *Id.*

> A "material" fact is one that is relevant to an element of a claim or defense and whose existence might affect the outcome of the suit. The materiality of a fact is thus determined by the substantive law governing the claim or defense. Disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment.

T.W. Electrical Service, Inc. v. Pacific Electrical Contractors, Ass'n, 809 F.2d 626, 630 (9th Cir. 1987).

Neither party seriously disputes the facts giving rise to the issues in suit. Instead, the parties disagree over the requirements of the CWA, and whether Plaintiffs' activities fall within the CWA's proscriptions. The motions thus require construction of the Act in light of the undisputed facts.

B. Section 301 Violation

To establish that Plaintiffs violated section 301 of the CWA, Defendants must show "(a) that [they have] jurisdiction over the subject waters, (b) that the [Plaintiffs] discharged or placed fill [or pollutant] in those waters, and (c) that the [Plaintiffs] did so without a permit from

the Corps." *United States v. Zanger*, 767 F. Supp. 1030, 1033 (N.D. Cal. 1991).

1. Jurisdiction over the Subject Waters

The Corps' section 404 jurisdiction over "waters of United States" includes navigable waters; interstate waters and wetlands; all other waters, the use, degradation, or destruction of which could affect interstate or foreign commerce;[4] tributaries of all above waters; and wetlands adjacent to such waters. *See* 33 C.F.R. § 328.3; 40 C.F.R. § 232.2. *See also United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 139 (1985) (approving the Corps' interpretation of its CWA jurisdiction to include wetlands adjacent to navigable waterways). Borden Ranch supports primarily three types of waters of the United States: vernal pools, sloped wetlands (also known as swales), and intermittent drainages. *See* Undisputed Material Fact ("UMF") 45. Some intermittent streams on Borden Ranch are tributaries to tributaries of the Sacramento River, a water used in interstate commerce. *Id.* at 48-49.

Plaintiffs "do not dispute the accuracy of [the Corps'] delineation of areas on Borden Ranch as wetlands" for the purposes of their motion. Pls.' Mem. Supp. Mot. Summ. J. at 1, n.1. Therefore, Defendants' jurisdiction over the subject waters is not at issue. However, the

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[4] "Other waters" includes "intrastate lakes, river, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, wet meadows, playa lakes, or natural ponds." 33 C.F.R. § 328.3(a)(3); 40 C.F.R. § 232.2.

parties vigorously dispute whether Plaintiffs' deep ripping and disking activities cause "discharge of any pollutant" or "dredged or fill material into the navigable waters," which requires a permit. *See* 33 U.S.C. §§ 1311, 1344.

2. Discharge of Dredged or Fill Material and Addition of a Pollutant from a Point Source

Under the CWA, "dredged material" is defined as "material that is excavated or dredged from the waters of the United States." 33 C.F.R. § 323.2(c); 40 C.F.R. § 232.2. "Fill material" is "any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a water body." 33 C.F.R. § 323.2(e); *see also* 40 C.F.R. § 232.2 (defining "fill material" as "any pollutant which replaces portions of the waters of the United States with dry land or which changes the bottom elevation of a water body for any purpose"). The definition of "pollutant" includes "dredged spoil,. . . . rock, sand, cellar dirt, . . . and agricultural waste discharged into water." 33 U.S.C. § 1362(6).

"Discharge of dredged material" means "any addition of dredged material into, including any redeposit of dredged material within, the waters of the United States."[5] 33 C.F.R. § 323.2(d); 40 C.F.R. § 232.2. "Discharge

[5] Section 404 authorization is not required for "any incidental addition, including redeposit, of dredged material associated with any activity that does not have or would not have the effect of destroying or degrading the waters of the United States." 33 C.F.R. § 323.2(d)(3)(i); *see also* 40 C.F.R. § 232.2. An activity associated with the discharge of dredged material destroys the waters of the United States "if it alters the area in such a way that it would no longer be a water of the United States." 33 C.F.R. § 323.2(d)(4); 40 C.F.R. § 232.2. An activity associated with the discharge of dredged material degrades the waters of the United States "if it has more than a de minimis (i.e., inconsequential) effect on the area by causing an identifiable individual or cumulative effect on any aquatic function." 33 C.F.R. § 323.2(d)(5); 40 C.F.R. § 232.2.

of fill material" is "the addition of fill material into waters of the United States."[6] 33 C.F.R. § 323.2(f); 40 C.F.R. § 232.2. "Discharge of a pollutant" is "any addition of any pollutant to navigable waters form any point source." 33 U.S.C. § 1362(12).

Here, the only question is whether Plaintiffs' deep ripping and disking activities are subject to section 404 permit requirements. UMF 31-33, 35-36. The answer depends upon whether or not deep ripping and/or disking cause "discharge" of "fill or dredged material" or "pollutant from a point source" into protected waters. Deep ripping is a type or technique of plowing used by farmers throughout the nation in preparation for the planting of deep-root crops that require water to penetrate down into the root zone. UMF 36, 59. It is achieved by running a four- to seven-foot deep plow through the land to break up compacted soils in order to allow percolation of water deeper into the soil. *Id.* at 31, 58. Disking

[6] With reference ot 33 C.F.R. § 323.4, which defines activities exempt from permit requirements, "[t]he term ["discharge of fill material"] does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products." 33 C.F.R. § 323.2(f).

penetrates approximately twelve inches into the soil. *Id.* at 32. Deep ripping and disking break up, mix, homogenize, loosen, aerate, and horizontally move soil. *Id.* at 33, 60. Plaintiffs use rippers, disks, and rollers attached to tractors and bulldozers with blades raised to pull plows through the soil on Borden Ranch, breaking up, mixing, and turning over material already in the pools, swales, and intermittent streams. *Id.* at 38, 62.

Plaintiffs argue that deep ripping and disking do not produce "fill" since nothing is added to the soil as a pollutant and any earth that is disturbed already exists on the site. Pls.' Mem. Supp. Mot. Summ. J. at 37-38. However, redeposit of earth can constitute "addition of a pollutant." *See Rybachek v. EPA*, 904 F.2d 1276, 1285-86 (9th Cir. 1990) (stating that "even if the material discharged originally comes from the streambed itself, such resuspension may be interpreted to be an addition of a pollutant under the Act" and " 'the word "addition," as used in the definition of "discharge," may reasonably be understood to include "redeposit" ' ") (quoting *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 923 (5th Cir. 1983)); *In re Alameda County Assessor's Parcel No. 537-801-2-4*, 672 F. Supp. 1278, 1284-85 (N.D. Cal. 1987) (stating that fill dirt is a pollutant). Earth can also constitute "dredged or fill material" where it causes or contributes to degradation or destruction of the "waters." *See Avoyelles*, 715 F.2d at 923 ("If vegetation or other materials are redeposited in the wetland, that activity is a discharge"); *United States v. Tilton*, 705 F.2d 429, 430 (11th Cir. 1983) (enjoining unpermitted discharge of fill material "consisting of woodchips, pine bark, and soil"); *United States v. Sinclair Oil Co.*, 767 F.Supp 200, 204 (D. Mont. 1990) ("the regulation does not distinguish between indigenous material and foreign materials").

Plaintiffs attempt to distinguish their activities from those requiring a section 404 permit. First, Plaintiffs argue that their primary purpose for deep ripping and disking is not to fill wetlands but to enhance the soil's agricultural viability. Pls.' Mem. Supp. Mot. Summ. J. at 36. However, the purpose for which a discharge is made is irrelevant to the determination of whether addition of a particular substance is a "discharge" under the Act. *See Minnehaha Creek Watershed Dist. v. Hoffman*, 597 F.2d 617, 627 (8th Cir. 1978) (finding "no justification in the Act for the District Court's determination that whether the discharge of a particular substance . . . constitutes a discharge of a 'pollutant' depends upon the purpose for which the discharge is made"); 40 C.F.R. § 232.2 (defining "fill material" as "any pollutant which replaces portions of the waters of the United States with dry land or which changes the bottom elevation of a water body for any purpose"); *see also United States v. Earth Sciences, Inc.*, 599 F.2d 368, 374 (10th Cir. 1979) (stating that liability under the CWA is strict). Second, Plaintiffs argue that deep ripping and disking move soil no more than a "de minimis" horizontal distance and, third, that the "fallback" of soil from a plow is analogous to unregulated "incidental fallback" that attends mechanized dredging operations. Pls.' Mem. Supp. Mot. Summ. J. at 18-21, 37, 38; Pls.' Reply Mem. at 21. Neither of these arguments, however, is relevant to the determination of whether Plaintiffs' activities come within section 404 permit requirements.[7]

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[7] Plaintiffs' reliance on the district court's invalidation of the *Tulloch* Rule in *American Mining Congress v. United States*

See Minnehaha, 597 F.2d at 626-27 (rejecting district court's conclusion that "significant alteration in water quality must be demonstrated before discharge of a particular substance to navigable waters can be classified as the discharge of a pollutant").

In fact, Plaintiffs concede that what they have characterized as "mistaken" deep ripping and disking of admitted wetlands and other waters resulted in those waters' losing the ability to hold and convey water. *See* UMF 78-79. This conversion of wetlands and other waters to dry land alone proves that Plaintiffs' plowing activities,

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Army Corps of Engineers, 951 F.Supp. 267, 272 (D.D.C. 1997), which is currently pending on appeal, is unavailing. Prior to the *Tulloch* Rule, "the agencies did not regulate under § 404 excavation activities that involved the removal of materials from waters, such as landclearing, ditching, and channelization, even if those activities might have adversely impacted wetlands or waters." *American Mining Congress*, 951 F. Supp. at 269. Under the *Tullock* Rule, however, the agencies regulate removal activities "because they consider the 'incidental fallback' that accompanies *dredging* to be a 'discharge' under § 404." *Id.* The *Tulloch* Rule applies only to dredging activities. *See id.* Plaintiffs argue that their activities are limited to plowing land "in its natural state and condition" and that the CWA does not apply to their activities in the first instance. *See* Johas Decl. ¶ 12; Compl. ¶ 7. Contrary to Plaintiffs' argument, *American Mining Congress* does not apply to this case. That decision dealt with excavation and mechanized landclearing and "de minimis (i.e., inconsequential) effect" and "incidental addition, including redeposit," concepts relevant only to dredging activities under the Act. *See* 33 C.F.R. §§ 323.2(d)(3)(i), 323.2(d)(5); 40 C.F.R. § 232.2. These concepts are not part of the provisions governing "discharge of fill material" or "addition of pollutants" at issue here. *See* 33 U.S.C. § 1362(6), 33 C.F.R. § 323.2(e); 40 C.F.R. § 232.2.

without more, can cause the discharge of fill material, which, in turn, causes the destruction of waters.[8]

Plaintiffs argue that plows cannot be characterized as point sources.[9] *See* Pls.' Reply Mem. at 10-11. The CWA neither explicitly excludes nor includes plows from the definition of "point source."[10] *See* 33 U.S.C. § 1362(14).

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[8] Plaintiffs object strenuously to defense expert Lyndon Lee's descriptions of deep ripping and disking on Borden Ranch. *See* Pls.' Reply Mem. at 19-27. Plaintiffs' concern over Dr. Lee's alleged failure to describe soil movement "for any significant distance," however, is misplaced. *See id.* at 20. Nothing in the CWA suggests that a quantitative minimum of a particular substance's movement is determinative of its classification as fill. *See Minnehaha*, 597 F.2d at 627. The CWA "was intended to control the degradation of aquatic resources that results from *any* replacement of water with fill material, as well as the degradation that results from the discharge of dredged or fill material. . . . " *Id.* (emphasis added). Furthermore, that earth can constitute "fill material" or "pollutant" within the meaning of the Act can be decided without reliance on Dr. Lee's declaration since Plaintiffs' prior plowing activities alone prove that fact. *See* UMF 78-79. Accordingly, Plaintiffs' specific objections to Dr. Lee's declaration need not be addressed.

[9] Plaintiffs correctly state that a pollutant can only be discharged from a point source. *See* 33 U.S.C. § 1362(12) (defining "discharge of pollutant" as "any addition of any pollutant to navigable waters from a point source"). Although plows can constitute point sources, Plaintiffs' liability under section 404 is alternatively established without reference to point sources by the fact that their plowing activities can cause discharge of fill material.

[10] "Point source" is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other

However, where discharges of substances have threatened protected waters, even items such as backhoes and bulldozers have been found to be "point sources." *Avoyelles*, 715 F.2d at 929. *See also Alameda County Assessor's Parcel*, 671 F. Supp. at 1284-85 ("In situations where an individual has been unlawfully dumping fill dirt on wetlands, the courts have consistently found that dump trucks, trailer trucks, bulldozers, and earth graders all qualify as 'point sources' for purposes of the CWA"). Accordingly, "the definition of a point source is to be broadly interpreted" to encompass conveyances from which pollutants might enter waters of the United States. *Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114, 118 (2d Cir. 1994). Under this definition, Plaintiffs' plows could be "point sources."

3. The Requirement of a Section 404 Permit

Having established that Plaintiffs could have "discharged" "fill material" or "pollutant from a point source" into "waters of the United States" by engaging in deep ripping and disking activities, the remaining question is whether Plaintiffs did so without a section 404 permit. Plaintiffs admit that "there are approximately 9.99 acres of delineated wetlands/waters on the Borden Ranch parcels where [such] plowing activities have occurred" without a section 404 permit. *See* Whitney Reply Decl. ¶ 8; UMF 27; Coe Decl. ¶ 21, Exh. 8; Joint Stip. & Prelim. Inj. Order filed 10/20/97 at 2.

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floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Thus, the "point source" concept incorporates both physical and functional characteristics.

Since such activities may cause discharge of fill material or pollutant into waters of the United States, they may not occur prior to completion of the section 404 permit process. *Cf. Public Interest Research Group of New Jersey v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 72-73 (3rd Cir. 1990) (stating that a CWA enforcement action only requires showing that the offending discharge "may" cause the alleged adverse effects). Therefore, Defendants' request for declaratory judgment that Plaintiffs' deep ripping and disking violate section 301 is granted. The existence of disputed facts, however, prevents summary adjudication of whether Plaintiffs' activities *actually* constitute a CWA violation.[11]

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[11] Although Defendants' Cross complaint prays for other forms of relief, including assessment of civil penalties for CWA violations, their motion failed to place these requests at issue. Furthermore, the existence of disputed facts concerning both the extent and the effects of particular instances of Plaintiffs' unpermitted deep ripping and disking activities on Borden Ranch precludes assessment of any particular section 301 violation on summary judgment.

It should be noted that while Plaintiffs applied for a section 404 permit in February 1997 "for the balance of the Borden Ranch owned by them," Defendants ceased processing the permit application. *See* UMF 26-27. Thus, this case comes before the Court unaccompanied by the Corps' decision on Plaintiffs' application for a permit. Consequently, the Court lacks the benefit of the agency's findings on the same issues raised by this lawsuit. In *Avoyelles*, the Fifth Circuit discussed the benefit of establishing an administrative record in advance of seeking judicial review where, as here, "[t]he question . . . is the extent, not the existence, of agency jurisdiction":

> Basically speaking, since [defining wetlands] is a responsibility which Congress has designated the Corps and two other Government agencies to

C. Normal Farming Exemption

Next, Plaintiffs argue that they are exempt from the permit requirement. Indeed, section 404 exempts certain activities from coverage. *See* 33 U.S.C. § 1344(f). "[N]ormal farming, silvicultural, and ranching activities" are generally exempted from permit requirements, and "plowing"[12] is specifically exempted. *Id.*; 33 C.F.R.

> accomplish, it is their primary responsibility and they have the expertise to handle the question. And since in just about all cases that the Court has come into contact with, these cases have been cases in which the court has the benefit of the consideration given by the agencies and is not called upon to be the agency of first impression, or to use its own initiative in making a definition or enforcing it. It has been asked to review a definition made by persons who are experts in that field and have accumulated expert testimony. . . . [T]he Court ordinarily has the benefit of this consideration. And I feel that the Court in this instance should also have the benefit of this consideration, if it is possible to do so.

Avoyelles, 715 F.2d at 904 (quoting Prel. Inj. Hr'g tr.). *See also infra*, note 17.

[12] "Plowing" is

> all forms of primary tillage, including moldboard, chisel, or wide-blade plowing, discing, harrowing and similar physical means utilized on farm, forest or ranch land for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops. The term does not include the redistribution of soil, rock, sand, or other surficial materials in a manner which changes any area of the waters of the United States to dry land. For example, the redistribution of surface materials by blading,

grading, or other means to fill in wetland areas is not plowing. Rock crushing activities which result in the loss of natural drainage characteristics, the reduction of water storage and recharge capabilities, or the overburden of natural water filtration capacities do not constitute plowing. Plowing as described above will never involve a discharge of dredged or fill material.

33 C.F.R. § 323.4(a)(1)(iii); 40 C.F.R. § 232.3(d)(4). Plaintiffs' activities that cause "redistribution of soil, rock, sand, or other surficial materials in a manner which changes any area of the waters of the United States to dry land" do not fall within the definition of exempted "plowing."

§ 323.4; 40 C.F.R. § 232.3. However, to fall within the statutory exemptions, an activity must be part of an "established (i.e., on-going) farming, silviculture, or ranching operation." 33 C.F.R. § 323.4(a)(1)(ii); 40 C.F.R. § 232.2(c)(1)(ii)(A); *United States v. Akers*, 785 F.2d 814, 819 (9th Cir. 1986). The exemption is not available either (1) for "[a]ctivities which bring an area into farming . . . use" or (2) where "modifications to the hydrological regime are necessary to resume operations." 33 C.F.R. § 323.4(a)(1)(ii); 40 C.F.R. § 232.3(c)(1)(ii)(B); *United States v. Brace*, 41 F.3d 117, 123 (3rd. Cir. 1994). Plaintiffs bear the burden of demonstrating that their activities are exempt from the section 404 permit requirements of the CWA. *Akers*, 785 F.2d at 819.

Plaintiffs fail to show that their activities qualify for an exemption.[13] Plaintiffs' exemption argument that

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[13] Plaintiffs argue that "Defendants' construction of 'normal' to mean 'established and ongoing' renders section 404(f)(1)(A) a mere 'grandfather clause' in direct contravention of Congress' intent." Pls.' Reply Mem. at 28. To the contrary, the requirement that "normal" farming activities be "established

Borden Ranch has historically been farmed and ranched and that their specific activities comport with traditional farming activities is similar to the argument rejected by the Ninth Circuit in *Akers*. *See* Pls.' Mem. Supp. Summ. J. at 41; *cf. Akers*, 785 F.2d at 819 (claiming entitlement to exemption on the bases of historic farming of land and undertaking of traditional farming activities). Specifically, the *Akers* court found that (1) upland crop production had not occurred on Akers' wetlands on a regular basis and (2), by his own admission, Akers' activities required "hydrological alteration" to the land. *Id.* at 819-20. In the instant case, while portions of Borden Ranch have been used for vineyards and orchards since 1993, the ranch has primarily been used as rangeland for the grazing of cattle. *See* UMF 3, 56. Although portions of Borden Ranch have also been used for the production of wheat, beets, tomatoes, beans, and corn since approximately 1940, upland crop production has not occurred on a regular basis. *Id.*; *cf. United States v. Larkins*, 657 F. Supp. 76, 85-86, n.23 ("even if the wetland had a history of farm use, that use was no longer established at the time of [Plaintiffs' activities]"). In fact, Plaintiffs admit that the land must be deep ripped and disked before it will be suitable for planting vineyards and orchards which "require water to penetrate down into the root zone." *See* UMF 58-59; *cf. Brace*, 41 F.3d at 125 (stating that "activities which bring an area into farming . . . use are not part of an established

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and ongoing" simply effects Congress' intent to exempt only those "narrowly defined activities that cause little or no adverse effects either individually or cumulatively." *Akers*, 785 F.2d at 819 (quoting 3 Leg. Hist. of the CWA of 1977 at 474 (Sen. Muskie)).

operation"). In other words, even if the subject wetlands and other waters on Borden Ranch were previously farmed, "modifications to the hydrological regime are necessary" to enable Plaintiffs to now plant orchards and vineyards. This evinces that Plaintiffs' activities are not part of an established farming operation.

Plaintiffs also rely on the definition of "normal" in Webster's Dictionary and the definition of "wetlands" in the Federal Agriculture Improvement and Reform Act to preclude inquiry into whether their activities are established and ongoing. *See* Pls.' Mem. Supp. Summ. J. at 11, n.4, 15, 35; Pls.' Reply Mem. at 29. However, "the proper question is whether the activities performed by [Plaintiffs] at this particular site, and at a time when the CWA applied, were within the meaning of the statutory term 'normal farming activities' as defined by the regulations." *Brace*, 41 F.3d at 127. Furthermore, courts must defer to "[a]n agency's construction of a statute it is charged with enforcing . . . if it is reasonable and not in conflict with the expressed intent of Congress." *Riverside Bayview Homes*, 474 U.S. at 131. Courts must "especially defer where the Agency's decision on the meaning or reach of the Clean Water Act involves reconciling conflicting policies committed to the Agency's care and expertise under the Act." *Rybachek*, 904 F.2d at 1284.

The intent of Congress in passing the CWA was "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a); *Riverside Bayview Homes*, 474 U.S. at 132. To effectuate this goal, Congress implemented the permit programs, which are "the central enforcement tool[s] of the Clean Water

Act," *Brace*, 41 F.3d at 123, and delegated broad regulatory authority to the Corps and EPA under the Act, *see, e.g.*, 33 U.S.C. § 1311.

Given Congress' dual objectives of comprehensively protecting waters of the United States and shielding certain, narrowly defined activities from regulation, the agencies' regulations are reasonable.[14] *See Riverside Bayview Homes*, 474 U.S. at 131 (limiting review of agency's construction of statute to "the question whether it is reasonable, in light of the language, policies, and legislative history of the Act"); *see also United States v. Huebner*, 752 F.2d 1235, 1240 (7th Cir. 1985) ("It is clear that the amendments that created the subsection (f) exceptions . . . were not intended to exempt all farming operations from the permit requirements"). Plaintiffs' activities must thus be examined in light of Defendants' regulations.

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[14] The Legislative History of the Act shows the intended breadth of its coverage:

> There is a national and Federal interest in waterways other than those on which a ship can be floated. . . . The Congress can abandon the national interest. The Congress can permit activities of a dredge-and-fill nature to go forward on those small streams, marshes, wetlands, and swamps which will make their way into the bigger waterways of this country and have a tremendous effect on the people of this country and on their welfare, on their crops, on many of their activities. Or we can establish a program of the sort the committee has established, which will protect all of those water systems, which will protect all of the elements of those systems. . . .

3 Legis. Hist. of the CWA of 1977 at 908 (Sen. Hart).

Because Plaintiffs' activities are not part of an ongoing farming operation, they are not exempt from section 404 permit requirements. Partial summary judgment is accordingly granted in Defendants' favor on the non-exempt status of Plaintiffs' deep ripping and disking activities that are not part of an established farming operation.

D. Recapture Provision

An activity otherwise exempt from section 404 permit requirements may require a permit pursuant to the "recapture provision." *See* 33 U.S.C. § 1344(f)(2); *Akers*, 785 F.2d at 822. Under the "recapture" provision "[a]ny discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area into a use which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters reduced, shall be required to have a permit." 33 U.S.C. § 1344(f)(2). Plaintiffs bear the burden of demonstrating that their activities are not "recaptured" and thus regulated under 33 U.S.C. § 1344(f)(2). *Akers*, 785 F.2d at 819.

Plaintiffs seek to convert use of their land from ranching and grazing cattle to growing vineyards and orchards.[15] *See* UMF 56. *Cf. Akers*, 785 F.2d at 822-23

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[15] Plaintiffs argue that the recapture provision is limited to "extraorindary wetlands conversion activities." Pls.' Reply Mem. at 32-33. Nothing in the CWA, however, restricts. application of the recapture provision exclusively to "extraordinary wetlands conversion activities." *See Akers*, 785 F.2d at 822 (indicating that "the proper inquiry is not what could

(stating that recapture provision applies where activities "change a wetland's hydrological regime"); *accord Brace*, 41 F.3d at 129. Plaintiffs' plowing of other waters of the United States for these purposes has impaired "the flow or circulation of navigable waters" and reduced "the reach of such waters," thereby causing those waters to cease to exist. *See* UMF 78-79. This is revealing evidence of the effect Plaintiffs' deep ripping and/or disking activities may have on other waters of the United States. Thus, regardless of whether Plaintiffs' plowing activities qualify for an exemption under subsection 404(f)(1), they would require a permit under subsection 404(f)(2).[16] "Giving the recapture provision the appropriate common sense reading," Defendants are entitled to declaratory judgment that Plaintiffs' deep ripping and disking of wetlands and other federal waters "are not exempt from

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have been done but what *was* done in the past . . . ") (emphasis added).

[16] Plaintiffs argue that "Defendants' interpretation of section 404(f)(2)'s recapture provision would entirely swallow the section 404(f)(1)(A) 'Farmer Exemptions.' " Pls.' Reply Mem. at 28. However, reinstating the permit requirement (via section 404(f)(2)) for activities that would otherwise be exempt but for change in use of the land reflects Congress' intent to allow exemption for activities only to the extent that they do not degrade or destroy federal waters. The exemptions are confined to certain, narrowly defined activities and do not work as a wholesale exemption for all activities falling within certain types of uses. *See Akers*, 785 F.2d at 822 (rejecting attempt to distinguish "change *within* the farming use" from "change in use" denoting a "major *type* of use") (emphasis added); *see generally* 40 C.F.R. § 230.1 (outlining policies underlying section 404 permit requirements).

permit requirements due to the likely drying effect"[17] on waters of the United States. *Akers*, 785 F.2d at 822-23.

E. Plaintiffs' Challenges to Defendants' Regulations and Exercise of Jurisdiction

Plaintiffs also argue that Defendants' regulations are invalid because they are arbitrary and capricious and contravene legislative intent. Further, Plaintiffs contend that Defendants' asserted basis for exercising jurisdiction is unavailing. Plaintiffs rely on the arbitrary and capricious standard because the CWA does not set forth standards for reviewing the Corps' or EPA's decisions, and courts look for guidance to the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 et seq. *See American Mining Congress v. EPA*, 965 F.2d 759, 763-64 (9th Cir. 1992). The APA generally provides that a court shall set aside agency findings, conclusions, and actions that are "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law," or that fail to meet procedural, statutory, or constitutional requirements. 5 U.S.C. §§ 706(2)(A), (B), (C), (D).

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[17] This ruling merely requires Plaintiffs to exhaust the section 404 permit procedure in advance of engaging in non-exempt or "recaptured" activities. It does not decide the propriety of granting or denying a permit. This is "precisely the type of agency decision that is normally subject to limited judicial review." *Avoyelles*, 715 F.2d at 906. As observed *supra*, note 11, since this litigation preceded completion of the permitting process, the Court was deprived of the benefit of a developed agency factual record on matters at issue. *See Ohio Forestry Ass'n*, 1998 WL 244192, at *5.

1. Facial Challenge to Validity

Pursuant to the APA, Plaintiffs challenge the "facial validity" of Defendants' regulations interpreting plowing and "other normal farming activities as resulting in the 'discharge of dredged or fill material.' "[18] Compl. ¶¶ 31-33. Actions brought pursuant to the APA are governed by a six-year statute of limitations. 28 U.S.C. § 2401(a); *Sierra Club v. Penfold*, 857 F.2d 1307, 1316 (9th Cir. 1988). The six-year statute of limitations on facial challenges to agency regulations commences on the date the regulations are published in the Federal Register. *Wind River Mining Corp. v. United States*, 946 F.2d 710, 715 (9th Cir. 1991). Because Plaintiffs' Complaint, which was filed in May 1997, contests regulations that were published in November 1986, all facial challenges to the validity of the regulations are time-barred and accordingly dismissed.[19]

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[18] Although a "facial validity" challenge is alleged in Count I of the Complaint, any as-applied challenge to the regulations that might also include a challenge to the application of the RGL is not ripe. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990) (stating that "a regulation is not ordinarily considered the type of agency action 'ripe' for judicial review under the APA until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him"); *Municipality of Anchorage v. United States*, 980 F.2d 1320, 1324 (9th Cir. 1992) (withholding judicial review where the EPA and Corps had adopted a memorandum of agreement but had not yet applied it to a specific permit); *see also supra*, note 2.

[19] Plaintiffs contend that Defendants waived the statute of limitations defense by failing to plead it in their Answer. Pls.' Reply Mem. at 37. Defendants, however, may raise a statute of limitations defense for the first time on a motion for summary judgment where no prejudice to Plaintiffs is shown. *Rivera v. Anaya*, 726 F.2d 564, 566 (9th Cir. 1984). Plaintiffs have not shown prejudice.

2. Due Process Challenge

In Count V of the Complaint, Plaintiffs attack Defendants' regulations for vagueness.[20] Compl. ¶¶ 45-47. Plaintiffs' challenge fails because Plaintiffs had actual notice that their activities might be subject to regulation. *See, e.g.*, Tsakopoulos Decl. ¶¶ 3-5, Exh. D; Coe Decl. ¶ 15. Even absent actual notice, Plaintiffs' due process challenge would fail.[21] *See Maynard v. Cartwright*, 486 U.S.

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[20] Because final agency action is ordinarily prerequisite to bringing a challenge under the APA, whether the APA provides Plaintiffs with a cause of action to challenge the regulations on constitutional grounds is unclear. *See* 5 U.S.C. § 704 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review"); *Dunn-McCampbell Royalty Interest, Inc. v. National Park Service*, 112 F.3d 1283, 1287 (5th Cir. 1997) ("to challenge a regulation after the limitations period [on a facial challenge] has expired, provided the ground for that challenge is that the issuing agency exceeded its constitutional or statutory authority,. . . . the claimant must show some direct, final agency action involving the particular plaintiff within six years of filing suit"). However, since Plaintiffs' due process and commerce clause challenges fail on the merits, there is no need to determine the existence of final agency action here.

[21] Plaintiffs also allege that Defendants violated Plaintiffs' due process rights "by shifting the burden of proof concerning compliance with Section 404 to the regulated parties." Compl. ¶ 47. Defendants correctly respond that the burden of proof in the enforcement action remains with Defendants and Plaintiffs bear only the burden of establishing the applicability of any exemptions. Defs.' Mem. Supp. Cross-mot. Summ. J. at 45. *See Akers*, 785 F.2d at 819; *Zanger*, 767 F. Supp. at 1033.

356, 361 ("objections to vagueness under the Due Process Clause rest on lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk"); *United States v. Weitzenhoff*, 35 F.3d 1275, 1289 (9th Cir. 1994) (upholding CWA permit against vagueness challenge where terms have meaning in the context of EPA regulatory scheme). Therefore, summary adjudication on Plaintiffs' due process challenge to the regulations is granted in favor of Defendants.

3. Commerce Clause Challenge

Plaintiffs argue that the Corps' exercise of jurisdiction based on EPA guidelines, which were adopted by the Corps and are known as the migratory bird rule, exceeds Defendants' delegated commerce clause authority. Compl. ¶¶ 48-52. Plaintiffs specifically contest Defendants' exercise of jurisdiction over four isolated vernal pools on Borden Ranch that have been plowed. Pls' Reply Mem. at 47-50. The pertinent part of the guidelines at issue defines waters as having sufficient ties to interstate commerce as follows: "(a) [w]hich are or would be used as habitat by birds protected by the Migratory Bird Treaties; or (b) [w]hich are or would be used as habitat by other migratory birds which cross state lines; or (c) [w]hich are or would be used as habitat for endangered species."[22] Definition of Waters of the United States, 51 Fed. Red. [sic] 41,217 (1986). Therefore, the issue is

[22] Included in the Corps' definition of "waters of the United States" are "interstate waters and wetlands." 33 C.F.R. § 328.3(a)(2).

whether the commerce clause authorizes the federal government to exercise regulatory jurisdiction over isolated intrastate waters that may serve as habitat for migratory birds and endangered species.

In 1990, the Ninth Circuit decided this very issue, holding that "[t]he commerce clause power, and thus the Clean Water Act, is broad enough to extend the Corps' jurisdiction to local waters which *may* provide habitat to migratory birds and endangered species." *Leslie Salt Co. v. United States ("Leslie Salt II")*, 896 F.2d 354, 360 (9th Cir. 1990) (emphasis added).[23] But Plaintiffs suggest that the United States Supreme Court's ruling in *United States v. Lopez*, 514 U.S. 594 (1995), changed the law in this circuit.[24] Pls.' Reply Mem. at 48. Plaintiffs argue under *Lopez*

[23] The referenced waters were artificially created, seasonally wet, and non-adjacent to navigable waters. *See Leslie Salt II*, 896 F.2d at 359-60.

[24] Although Plaintiffs fail to address the entire *Leslie Salt* line of cases, Amici attempt to distinguish *Leslie Salt II* and *Leslie Salt III*. *See* PCC's Mem. Supp. Pls.' Mot. Summ. J. at 15 (stating that although the Ninth Circuit accepted the Corps' migratory bird argument, the court acknowledged that the Corps' jurisdiction depended upon "the property's specific connections to interstate commerce due to migratory bird use"); CMA's Mem. Supp. Pls.' Mot. Summ. J. at 9-10 (arguing that *Leslie Salt* is not controlling because *Leslie Salt III* "used the law of the case to blindly follow *Leslie Salt II*"). *Leslie Salt II's* holding, however, is not as limited as Amici suggest. *See Leslie Salt II*, 896 F.2d at 360 (holding that the commerce clause empowers the Corps' broad CWA jurisdiction). Furthermore, the commerce clause itself authorizes regulation of intrastate migratory bird habitats. *See Andrus v. Allard*, 444 U.S. 51, 63 n.19 (1979) (stating that "the underlying assumption that the

that Defendants must demonstrate that each subject isolated wetland on Borden Ranch "substantially affect[s] interstate commerce" before jurisdiction exists under the migratory bird rule. *Id.* One month after *Lopez* was decided, however, the Ninth Circuit affirmed its previous holding on the validity of the migratory bird rule. *Leslie Salt Co. v. United States ("Leslie Salt III")*, 55 F.3d 1388, 1392 (1995). Thus, in this Circuit, the migratory bird rule remains a valid application of Defendants' exercise of jurisdiction under Congress' commerce clause powers, provided that the waters in question *may* provide habitat to migratory birds and/or endangered species.[25]

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national commerce power does not reach migratory wildlife is clearly flawed").

Plaintiffs and Amici argue that *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997), controls the question of whether the migratory bird rule is a valid application of Defendants' commerce clause power. *See* Pls.' Reply Mem. at 49; CMA's Mem. Supp. Pls.' Mot. Summ. J. at 7-9; PCC's Mem. Supp. Pls.' Mot. Summ. J. at 12-13. Although the Fourth Circuit invalidated the migratory bird rule on the ground that it exceeded the commerce clause power in *Wilson*, it also acknowledged that "the power of Congress to regulate the discharge of pollutants into at least some nonnavigable waters is indisputable, but the limits of this power are far from clear." *Wilson*, 133 F.3d at 256.

[25] The Ninth Circuit is not alone in approving the migratory bird rule as a valid application of commerce clause power. *See Hoffman Homes, Inc. v. EPA*, 999 F.2d 256, 260-61 (7th Cir. 1993) (stating that the EPA reasonably interpreted the regulation both in regard to extending its jurisdiction to waters with "potential rather than actual, minimal rather than substantial" connection to interstate commerce and in "allowing migratory birds to be that connection between a wetland and interstate commerce"); *United States v. Marsh*, 740 F.2d 799, 804 (10th Cir. 1984) (finding proper the Corps' exercise of

> The migratory bird rule certainly tests the limits of Congress's commerce powers and, some would argue, the bounds of reason. In this case, there is no evidence of human contact with the seasonally ponded areas. The only humans that hunt or photograph the birds using these ponds apparently are doing so after they have reached other locations. Nevertheless, given the broad sweep of the Commerce Clause, the holding in Leslie Salt II cannot be considered clearly erroneous on this ground.

Leslie Salt III at 1396.

Because Borden Ranch is within the Pacific Flyway, an international migratory corridor for waterfowl and other migratory birds, UMF 54, isolated vernal pools located on Borden Ranch may serve as habitat for migratory birds. The Corps thus may have jurisdiction under the commerce clause. However, since the suitability of certain waters on Borden Ranch as habitat for either migratory birds or endangered species is in dispute, a genuine issue of material fact exists as to which waters may serve as habitat under the migratory bird rule.[26]

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jurisdiction over an intrastate lake that was "on the flyway of several species of migratory waterfowl which are protected under international treaties"); *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 1998 WL 139523, at *5 (N.D. Ill. Mar. 25, 1998) (finding that the migratory bird rule remains valid after *Lopez* and "authorizes the federal government to regulate isolated intrastate waters that provide a habitat for migratory birds even if the particular birds on the site do not substantially affect interstate commerce").

[26] The parties dispute application of the migratory bird rule to Borden Ranch by arguing different positions on whether

Accordingly, this issue is remanded to the Corps for further consideration. *See Camp v. Pitts*, 411 U.S. 138, 143 (1973) (stating that if an agency decision is not sustainable on the basis of the administrative record, then "the matter should be remanded to [the agency] for further consideration"); *see also Avoyelles*, 715 F.2d at 906 (observing that "[d]e novo review would permit the courts to intrude into an area in which they have no particular competence").

III.

CONCLUSION

For the foregoing reasons, Defendants' motion for summary judgment is GRANTED in part and Plaintiffs' motion is DENIED. The issue under the migratory bird rule and Plaintiffs' pending permit application are remanded to the Corps for further consideration.

IT IS SO ORDERED.

Dated: July 30, 1998

/s/ Garland E. Burrell, Jr.
GARLAND E. BURRELL, JR.
United States District Judge

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requisite presence on Borden Ranch of either migratory birds or endangered species has been established to create federal jurisdiction over the waters in issue. *Cf. Leslie Salt II*, 896 F.2d at 360 (stating that jurisdiction extends to waters that "*may* provide habitat") (emphasis added); *Hoffman Homes*, 999 F.2d at 261 (stating that before CWA violation can be determined, subject water must be found to be "a suitable or potential habitat for migratory birds").

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BORDEN RANCH PARTNERSHIP; ANGELO K. TSAKOPOULOS, Plaintiffs, v. UNITED STATES ARMY CORPS OF ENGINEERS, an Agency of the United States; and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, an Agency of the United States Defendants. AND RELATED CROSS-ACTION.	CIV-S-97-0858 GEB JFM ORDER* (Filed Aug. 10, 1998)

Plaintiffs move for entry of final judgment pursuant to Federal Rule of Civil Procedure 54(b)[1] and for certification of this Court's June 9, 1998, Order ("Order") for appeal pursuant to 28 U.S.C. § 1292(b). Defendants oppose the motion. For the reasons stated below, the motion is denied.

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* This case was determined to be suitable for decision without oral argument. L.R. 78-230(h).

[1] Unless otherwise noted, all references to Rules are to the Federal Rules of Civil Procedure.

A. Entry of Final Judgment

Plaintiffs seek entry of final judgment on their challenges to Defendants' regulatory jurisdiction under the Clean Water Act ("CWA") that were resolved by partial summary judgment. *See* Pls.' Mot. at 10-15. Defendants rejoin, arguing that entry of final judgment on adjudicated claims is inappropriate because the adjudicated claims are not separable from the unadjudicated counterclaim. *See* Defs.' Opp'n at 9.

To resolve a Rule 54(b) motion, "[a] district court must first determine that it is dealing with a final judgment . . . in the sense that it is a decision upon a cognizable claim for relief, and . . . an ultimate disposition of an individual claim entered in the course of a multiple claims action."[2] *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 7 (1980) (internal quotation marks omitted). "A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). Partial summary judgments are generally not final orders within the meaning of Rule 54(b).

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[2] In pertinent part, Rule 54(b) states:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

St. Paul Fire & Marine Ins. Co., v. F. H., 55 F.3d 1420, 1425 (9th Cir. 1994).

In this case, the Order on the parties' cross-motions for summary judgment declared lawful Defendants' regulatory jurisdiction over Plaintiffs' deep ripping and disking activities. Thus, Plaintiffs' claims challenging Defendants' CWA jurisdiction were adjudicated on the merits, making them "final" within the meaning of Rule 59(b). *See Curtiss-Wright Corp.*, 446 U.S. at 7.

However, "the district court must go on to determine whether there is any just reason for delay" of the appeal of individual final judgments. *Id.* at 8. This requires considering "judicial administrative interests as well as the equities involved" because "[n]ot all final judgments on individual claims should be immediately appealable, even if they are in some sense separable from the remaining unresolved claims." *Id.*

Plaintiffs argue that their "entire legal case challenging the [Corps'] jurisdiction under the CWA does not depend on disputed facts and has now been definitively resolved against plaintiffs by this Court." *See* Pls.' Mot. at 8, 11. To the contrary, Defendants' counterclaim for enforcement of the CWA is both legally and factually inseparable from the decided claims. Because the construction and interpretation of the CWA that determined Defendants' lawful regulatory jurisdiction over Plaintiffs' activities may bear directly upon whether Plaintiffs are, in fact, liable for violations of and penalties under the CWA, "it is not proper to direct entry of a separate judgment pursuant to Rule 54(b)." *Morrison-Knudsen Co., Inc. v. J.D. Archer*, 655 F.2d 962, 965-66 (9th Cir. 1981)

(finding error in district court's entry of separate judgments where counterclaim reserved for trial was factually and legally related to counterclaims adjudicated on summary judgment). "Judgment under Rule 54(b) must be reserved for the unusual case in which the costs and risks of multiplying the number of proceedings and overcrowding the appellate docket are outbalanced by the pressing needs of the litigants for an early and separate judgment as to some claims or parties." *Id; see also Continental Airlines, Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1525 (9th Cir. 1987) ("the solution for Rule 54(b) purposes lies in a more pragmatic approach focusing on severability and efficient judicial administration"). Here, awaiting final resolution of the case will not exact a "harsh and unjust result" sufficient to require the appellate court to "address legal or factual issues that are similar to those contained in the claims still pending before the trial court." *Morrison-Knudsen*, 655 F.2d at 965. For the stated reasons, Plaintiffs' motion for entry of final judgment is DENIED.

B. Certification for Appeal

Plaintiffs next argue that certification for appeal of the Order pursuant to 28 U.S.C. § 1292(b) is appropriate. See Pls.' Mot. at 15-19; Reply at 10-14. Defendants counter that the requirements of section 1292(b) are not met. *See* Defs.' Opp'n at 11-15.

"Section 1292(b) provides a mechanism by which litigants can bring an immediate appeal of a non-final order upon the consent of both the district court and the court

of appeals."[3] *In re Cement Antitrust Litigation*, 673 F.2d 1020, 1025-26, *aff'd, Arizona v. Ash Grove Cement Co.*, 459 U.S. 1190 (1983). The decision to certify an interlocutory appeal is within the sound discretion of the district court. *Swint v. Chambers County Comm'n*, 514 U.S. 35, 47 (1995). Three elements determine the appropriateness of section 1292(b) certification: (1) the order from which the appeal is taken must involve a controlling question of law; (2) there must be substantial grounds for a difference of opinion concerning the issue; and (3) an immediate appeal must "materially advance the ultimate termination of the litigation." *Id.* at 68.

The Order here involves controlling questions of law. "[A]ll that must be shown for a question to be 'controlling' is that resolution of the issue on appeal could materially affect the outcome of litigation in the district court." *In re Cement Antitrust Litigation*, 673 F.2d at 1026.

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[3] Section 1292(b) states:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

If the Ninth Circuit does not recognize Defendants' exercise of jurisdiction, then the outcome of the litigation in this Court would be changed materially.[4] Thus, the first element of section 1292(b) is met.

The second element of section 1292(b), however, is not met. Plaintiffs argue that possible intra-circuit splits on the issue of whether it is legal for Defendants to regulate Plaintiffs, deep ripping and disking constitute substantial grounds for a difference of opinion regarding Defendants' CWA jurisdiction. First, Plaintiffs contend that the reasoning of the Court of Appeals for the District of Columbia in *National Mining Ass'n v. United States Army Corps of Engineers*, No. 97-5099, 1998 WL 321064, at *6 (D.C. Cir. June 19, 1998), extends beyond dredging and excludes regulation of "incidental fallback" resulting from other activities. *See* Pls.' Mot. at 16, Reply at 11-12. Plaintiffs also contend that Defendants' exercise of jurisdiction pursuant to the migratory bird rule is called into question by another possible intra-circuit split. In support of their position, Plaintiffs cite *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997), which illustrates an interpretation of the migratory bird rule following *United States v. Lopez*,

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[4] The remaining issues decided by the order, which include dismissal of Plaintiffs' due process, facial, and as-applied challenges to CWA regulations and a December 12, 1996, Regulatory Guidance Letter issued by Defendant Army Corps of Engineers, are, collateral to Plaintiffs' central challenge to Defendants' regulatory jurisdiction. Because these issues could not materially affect the outcome of litigation, they are not controlling questions of law subject to interlocutory appeal. *See United States Rubber Co. v. Wright*, 359 F.2d 784, 783 (9th Cir. 1966) (per curiam).

514 U.S. 594 (1995), that is contrary to the result reached in *Leslie Salt Co. v. United States*, 55 F.3d 1388 (9th Cir. 1995).

Despite the possible intra-circuit splits on these issues, "it is the duty of the district judge . . . to analyze the strength of the arguments in opposition to the challenged ruling when deciding whether the issue for appeal is truly one on which there is a substantial ground for dispute." *In re Flor*, 79 F.3d 281, 284 (2d Cir. 1996). Thus, the issue to be decided requires analysis of the strength of the arguments in opposition to the challenged ruling as they apply to the existence of a substantial ground for dispute in the Ninth Circuit. While Plaintiffs repeatedly state that "this is a case of first impression involving mere plowing activities," *see, e.g.*, Pls.' Reply at 11, "the mere presence of a disputed issue that is a question of first impression, standing alone, is insufficient to demonstrate a substantial ground for difference of opinion." *In re Flor*, 79 F.3d at 284. Notwithstanding the D.C. Circuit's distinction of the Ninth Circuit's holding in *Rybachek v. EPA*, 904 F.2d 1276 (9th Cir. 1990), *see National Mining Ass'n*, 1998 WL 321064,at *6, *Rybachek's* holding that redeposit of earth can constitute "addition of a pollutant" controls in this circuit. *See Rybachek*, 904 F.2d at 1285-86. Finally, although *Leslie Salt* does not address the impact of *Lopez* on the validity of the migratory bird rule, it is presumed that the Ninth Circuit panel deciding the case knew that it was not bound by earlier Ninth Circuit precedent if the Supreme Court had changed the law in *Lopez*. Since the law in the Ninth Circuit appears to be settled on the issue of Defendants' CWA jurisdiction, this element does not favor granting the certification request. Furthermore,

even if Plaintiffs are correct in their argument that Ninth Circuit authority fails to pointedly address issues in suit, the certification request is nevertheless denied because Plaintiffs fail to satisfy the third element.

The third element requires consideration of whether an immediate appeal from the Order may materially advance the ultimate disposition of the action. Plaintiffs bear the burden of showing that the circumstances justify a departure from the basic policy of postponing appellate review until after entry of a final judgment. *See In re An. .rust Litigation*, 673 F.2d at 1026. Defendants argue that such an appeal could have "the effect of delaying the resolution of this litigation, because an appeal would almost certainly not be completed before February 1999 when trial is currently scheduled." *See* Defs.' Opp'n at

The course that Plaintiffs seek to pursue does not bode well for a prompt resolution of the issues in suit. Plaintiffs state that they contemplate ultimately seeking review in the United States Supreme Court, should the Ninth Circuit disagree with their position. *See* Pls.' Mo at 19. Further, Plaintiffs contend that unless the Court modifies the remand of "the predicate factual issues relevant to the Government's counterclaims . . . , plaintiffs fully expect that this Court will vacate the existing trial date and other case deadlines and stay this litigation until the [Corps'] processing of plaintiffs' permit application is complete – a lengthy process which could literally take years."[5] *See* Pls.' Mot. at 7 (emphasis added).

[5] Defendants have requested the Court to defer remand "until resolution of the United States' enforcement action in its Counterclaim against Mr. Tsakopoulos because Corps' regulations prohibit processing such 'after the fact" permits when enforcement litigation has been initiated by Federal, state, or local agencies. 33 C.F.R. § 326.4(e)(iv)." *See* Defs.' Opp'n at 15 n.10. While contending that they will suffer unjust, burdensome, and lengthy delay if their motion is not granted and they are forced to complete the permitting process, *see* Pls.' Mot. at 11-15, Plaintiffs simultaneously oppose Defendants' request to defer the process, *see* Pls.' Reply at 12-14.

33 C.F.R. § 326.3(e)(iv) supports Defendants' position and provides that "no permit application will be continued when the district engineer is aware of enforcement litigation that has been initiated. . . . " The district engineer alone appears vested with discretion under 33 C.F.R. § 326.3(c)(1) to make exceptions to strict application of § 326.3 (e)(iv), and apparently none have been found applicable here. Accordingly, the remaining factual disputes on Defendants' counterclaim will be resolved in the litigation without resort to completion of the permitting process.

As to modification of the case management order, the Court stated at the hearing on the cross-motions for summary judgment on May 18, 1998, that it would make the requested modifications regarding disclosure of experts and discovery cut-off. *See* R. at 62. The Court also stated that it would modify other case management dates if the ruling on summary judgment indicated the need. *See id.* In light of this ruling's deferral of completion of the permitting process, no further modification of the case management order seems necessary. If the parties, however, desire further modification, they have leave to show cause why such modification should be granted.

An immediate appeal would neither materially advance resolution of these issues, nor the other factual issues attendant to the Court's jurisdiction. *See Shurance v. Planning Control Int'l*, 839 F.2d 1347, 1348 (9th Cir. 1988) (denying interlocutory appeal where it "might well have

the effect of delaying [the] litigation"). The motion for certification under 28 U.S.C. § 1292 (b) is DENIED.

IT IS SO ORDERED.

Dated: August 7, 1998

/s/ Garland E. Burrell, Jr.
GARLAND E. BURRELL, JR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BORDEN RANCH PARTNERSHIP and ANGELO K. TSAKOPOULOS, Plaintiffs, v. UNITED STATES ARMY CORPS, OF ENGINEERS and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY Defendants.	CIV. S-97-0858 GEB JFM FINDINGS OF FACT AND CONCLUSIONS OF LAW (Filed Nov. 8, 1999)
And Related Counterclaim.	

Plaintiffs Borden Ranch Partnership ("the Partnership") and Angelo K. Tsakopoulos ("Tsakopoulos") commenced this action May 7, 1997, alleging statutory and constitutional claims and seeking declaratory and injunctive relief. The United States Environmental Protection Agency ("the EPA") counterclaimed for alleged violations of the Clean Water Act, 33 U.S.C. § 1311. Summary adjudication in favor of Defendants on Plaintiffs' claims was granted by an Order entered June 9 and amended August 3, 1998 ("the August 3, 1998, Order"). The counterclaim was tried to the bench from August 24 to September 16,

1999. The Court's findings of fact and conclusions of law are as follows.

I.

FINDINGS OF FACT

Findings of fact regarding background information are contained in subsection A., *infra*. Subsection B. describes specific impacts upon relevant hydrological features.

A.

Background

On June 30, 1993, Tsakopoulos acting as general partner of the Partnership purchased 8,348 acres of land situated ten miles east of Galt, California for approximately $8.3 million. Exhs. 4, 7, 8.[1] This noncontiguous property ("Borden Ranch") straddles Dry Creek, which forms the border between Sacramento County (to the North) and San Joaquin County (to the South). Approximately seventy percent of the property is north of Dry Creek. Exh. 67. Borden Ranch previously had been used primarily as rangeland for grazing cattle and producing wheat, hay, alfalfa, tomatoes, sugar beets, beans, and corn. Tsakopoulos intended to convert the majority of the land for use as vineyards and orchards to increase the value of the property.

Besides Dry Creek, Borden Ranch encompasses Goose Creek – which runs east to west through the San

[1] The property is titled in Tsakopoulos himself.

Joaquin County portion of Borden Ranch – and a significant number of hydrological features known as swales, vernal pools, and intermittent drainages. A swale is a sloped wetland containing aquatic plant life which allows passage of small animal life, slows peak water flows, filters water, and minimizes erosion and/or sedimentation. A vernal pool is a low point in the landscape underlain with a dense soil layer and wherein rainwater collects. Generally, it is inundated part of the year and is dry during the summer, and may or may not be connected with other hydrological features. Vernal pools also commonly serve as habitat for exotic species of wildlife that have adapted to these features' uncommon characteristics. Some of these species have been deemed threatened or endangered under the Endangered Species Act. In the United States, vernal pools are found chiefly within California and are prevalent in the Central Valley. Intermittent drainages are basically streams or water courses with a defined bed and bank that generally transport water during and after rains. The intermittent streams on the San Joaquin County portion of Borden Ranch are tributaries of Goose Creek and Dry Creek, which are tributaries to the Cosumnes and Mokelumne Rivers.

Most of Borden Ranch is underlain with a dense layer of soil, called a "restrictive layer," or "clay pan," which prevents surface water from reaching the depths required to be reached to successfully utilize the property for vineyards and orchards, which have deeper root systems than crops previously grown on the property. Consequently, Tsakopoulos planned to plow much of the property using plows that dig into the ground to a depth of

five to seven feet. This is called "deep ripping" and is accomplished by dragging long metal "shanks" through the ground. Deep ripping alters the movement of surface and subsurface water in the ripped areas by moving earth, rock, sand, and biological matter both horizontally and vertically. This allows water to percolate to greater depths and limits or destroys the ability of jurisdictional waters to retain water. Borden Ranch also was plowed occasionally to a depth of 12 to 16 inches using a method called "discing." The purpose of these plowing activities was, in part, to disturb the restrictive layer of the soil so that deeper layers of soil could accept and retain moisture.

Tsakopoulos was aware of the presence of swales, drainages, and vernal pools on the property at the time he purchased Borden Ranch. Exh. 2. He also was aware that most or all of these features constituted "waters of the United States" within the meaning and coverage of the Clean Water Act ("the Act"); and, that any discharge of fill material into a water of the United States was prohibited by the Act unless a permit was obtained from the United States Army Corps of Engineers ("the Corps"). Tsakopoulos has also been a real estate developer since the early 1960s and had dealt with the Corps and applied to the Corps for permits under the Act, on several occasions since the mid-1980s in connection with activities associated with various projects he was undertaking which implicated the Act and the Corps's jurisdiction thereunder. He had previously learned that there exists an exemption from the Corps's permit requirement for certain farming activities, including plowing, and he

questioned whether this exemption applied to his contemplated deep ripping activity.

Sometime in mid-1993, Tsakopoulos contacted Thomas Coe, an officer at the Sacramento District of the Corps, and asked him whether the land preparation activities he anticipated undertaking on Borden Ranch would require a permit. Coe told him that a permit could be required if those activities would affect wetlands. Shortly thereafter, Tsakopoulos met with Coe and other Corps officials to discuss whether the planned plowing would be exempt from coverage under the Act as agricultural activity. The Corps maintained that a permit would be required. In late October of 1993, Tsakopoulos notified the Corps that he planned to cause plowing of a 444-acre portion of Borden Ranch on the Sacramento side of Dry Creek, known as the Castlehill parcel, and that this plowing would impact approximately seven acres of wetlands. Tsakopoulos hoped this notification would enable him to obtain authorization under a "nationwide permit," by which the Corps has allowed otherwise-prohibited discharges of dredge or fill material into a certain maximum area of jurisdictional waters conditioned upon, *inter alia*, prior notice being given to the Corps. *See* 33 C.F.R. Part 330, App. A(B)(26) (1993). When Corps representative Karen Shaffer visited the property in October of 1993 to verify certain wetland delineation maps provided by Tsakopoulos, she noted that Tsakopoulos's crews had already commenced deep ripping the property and were driving their plows over wetlands with the metal shanks raised at least partially out of the ground. She perceived that this activity disturbed the soil to a depth of approximately six inches. Exh. 9. Consequently, she told

Tsakopoulos's representative then that undertaking such activity on the property's wetlands without a permit would violate the Clean Water Act. *Id.* An attorney for Tsakopoulos thereafter wrote to the Corps, indicating that Tsakopoulos had a sale of that parcel pending and requesting immediate advice regarding whether the planned ripping and discing activities on the Castlehill parcel could proceed. Exh. 10. The Corps responded via a letter in early November 1993 wherein the Corps reiterated that Tsakopoulos's indicated activities could cause "discharge of dredged or fill material in waters of the United States" and that this would be allowed to occur into up to one acre of wetlands on the parcel under the nationwide permit, but a permit would have to be obtained "under Section 404 of the Clean Water Act" if more than one acre was affected. Exh. 11.

When the Corps concluded that the impacts of the proposed plowing on the Castlehill parcel would not be "minimal," it notified Tsakopoulos in late November of 1993 that he was not eligible for the nationwide permit. Exh. 12. The parties undertook further negotiations and, in March of 1994, the Corps agreed to allow the Castlehill plowing to take place in exchange for certain mitigation activities being undertaken by Tsakopoulos. Specifically, Tsakopoulos was required to construct 4.77 acres of seasonal wetlands and to enhance and preserve certain other wetlands on the property. An after-the-fact permit for the Castlehill project issued March 15, 1994. Tsakopoulos eventually sold the Castlehill parcel in September of 1994 for approximately $1.66 million. Exh. 67.

In May 1994, Tsakopoulos evinced a change of heart regarding Borden Ranch; he wrote to the Corps stating

that he had abandoned his plan to convert the majority of Borden Ranch for use as vineyards due to the expense attended to the permitting process. Exh. 547. He said he would focus on continuing use of the property for ranching purposes. By missive dated July 6, 1994, the Corps reiterated its position that deep ripping would not be exempt from Clean Water Act regulation. Exh. 24. In late September of 1994, Tsakopoulos and the Corps met with representatives of the EPA to discuss whether certain range management activities would be exempt from regulation under the Clean Water Act. At this meeting, Tsakopoulos indicated that he still intended to deep rip the "uplands" – areas that are not federal wetlands – and the Corps indicated that this would not require a permit. Tsakopoulos further sought to drive deep ripping equipment over wetlands with the shanks raised to their uppermost position in order to avoid plowing those wetlands. Tsakopoulos's consultant, Andrew Johas, represented that this would result in no continuous disturbance, but only in occasional "tagging" of the soil as bumps in the landscape met the raised shank. The Corps agreed to allow this driving over the swales, but forbade driving over the vernal pools.[2]

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[2] Tsakopoulos testified at the bench trial that the agency officials had stated at this meeting that the vernal pools could legally be disced without a permit. That testimony was not veracious and is belied by the consistent position federal officials expressed to Tsakopoulos on this matter. As to the directives Tsakopoulos was given about deep ripping activity in jurisdictional wetlands, the no-ripping directive was clear and unwavering. Although Tsakopoulos attempted to show that there was confusion about this amongst federal agencies, the directive he received from the Corps was categorical and pellucid.

In April of 1995, the Corps discovered that deep ripping of wetlands had occurred on another portion of Borden Ranch called the Prudential parcel. A Cease-and-Desist letter issued April 12, 1995, that directed Tsakopoulos to stop deep ripping activities in waters of the United States. Exh. 30. At an April 18, 1995 meeting with representatives from the Corps, Tsakopoulos contended his understanding after the September 1994 meeting had been that all portions of Borden Ranch could be deep ripped except the vernal pools. Exh. 558. After further discussions that month, Tsakopoulos submitted an application in May of 1995 for a permit covering a 1,268-acre area in Sacramento County. Exh. 36. In conjunction with this application, Tsakopoulos agreed to set aside 1,600 acres of Borden Ranch north of Dry Creek as a wetland preserve. *Id.* The application was handled on an "emergency" basis; a permit was sent to Tsakopoulos for his signature at the end of May 1995. However, Tsakopoulos objected to certain details in the permit, drew a line to exclude the mitigation provision, and then signed and returned the permit to the Corps. Exhs. 38, 40. The Corps responded by informing him in a June 30, 1995 letter that his alteration voided the permit and he was deemed to be proceeding without one. Exh. 40. In mid-July, Tsakopoulos submitted another permit application to construct and operate a separate 816 acres of vineyards on the Sacramento County side. Exh. 572.

Deep ripping activities continued on the Sacramento County side without a permit and commenced on the San Joaquin County side of Borden Ranch in October of 1995. In November of 1995, the Corps learned that deep ripping on wetlands had again occurred, this time in two areas on the Sacramento County side, one of which had

been part of the wetlands preserve that Tsakopoulos had indicated would be set aside as mitigation in his May 1995 permit application. Exhs. 580, 582. A second Cease-and-Desist letter issued November 22, 1995. Exh. 50.

Deep ripping on the San Joaquin County side proceeded initially in parcels numbered 6 and 10. Exh. 47. It is unclear to what extent flagging of jurisdictional waters had taken place there. At a late November 1995 meeting attended by representatives of Tsakopoulos and Sugnet and Associates ("Sugnet"), the company hired by Tsakopoulos to assist in the permitting process, the flagging and marking of property on the San Joaquin County side of Borden Ranch was discussed. Deep ripping also occurred in parcels 8 and 9 on the San Joaquin County side, where only vernal pools had been flagged to alert deep ripper equipment operators to avoid them. The senior project manager from Sugnet told Tsakopoulos that flagging was done *only* around vernal pools pursuant to a direction from Chris Vrame, one of Tsakopoulos's consultants. Vrame, who also was present, told Tsakopoulos that he had received such direction in a memorandum from Tsakopoulos's company, AKT Development Corporation. Tsakopoulos became very upset, and Vrame directed that flagging be placed around all swales and drainages on the San Joaquin side and that aerial photographs be taken of the damaged areas.

On December 4, 1995, Coe and Tsakopoulos visited a portion of the Sacramento County side of Borden Ranch, delineated as parcel 15, and observed that some of the swales located thereon had been deep ripped and then disced, resulting in their complete obliteration, and that only some of the vernal pools had been flagged by the plowing crews. Those not flagged had been filled in with

soil. Tsakopoulos indicated that he had told the plow operators to completely avoid the vernal pools. In late December of 1995, Tsakopoulos executed a contract to sell parcel 10 on the San Joaquin County side, encompassing 197 acres, to a California partnership called Watts Vineyard for $574,000. Exh. 60. By the end of 1995, Tsakopoulos had sold two other parcels totaling approximately 1,266 acres for slightly more than $5.45 million, in addition to the Castlehill and Watts Vineyard sales. Exh. 67.

In early January of 1996, Sugnet prepared a summary of the amount of acres of "basins" and swales that had been deep ripped. The "basins" therein referred to vernal pools. According to Sugnet's summary, 0.52 acres of swales had been deep ripped on the San Joaquin County side of the property in parcels 6 and 10. Exh. 61. This summary was transmitted to Vrame.

In February of 1996, the EPA entered into discussions with Tsakopoulos aimed at the execution of an Administrative Order on Consent ("AOC") which would address all Clean Water Act violations on the Sacramento County side of Borden Ranch. In March of 1996 Tsakopoulos submitted a map delineating wetlands features on the San Joaquin County side. Exh. 63. An officer from the Corps, Thomas Cavanaugh, visited Borden Ranch twice in early April 1996 to verify this delineation map. During his visits, he noted that several swales on parcels 6 and 10 had been deep ripped; furrows caused by plowing in those areas were two-to-three feet deep and crossed over the wetlands. However, vernal pools on parcel 10 apparently had been avoided by the plows. After field verification was completed, the wetlands delineation map was revised. The Sugnet wetlands delineation map identified

a total of 66.29 acres of "jurisdictional waters" of the United States on the San Joaquin County side of Borden Ranch. Exh. 65.

Tsakopoulos entered into a contract in March of 1996 to sell a 400-acre portion on the Sacramento County side to a California corporation, Farmland Management Services, for $1.4 million. Exh. 588. By April 30, 1996 he had sold or had sales pending for 4,036 acres of Borden Ranch. Exh. 67. The total sales price for this property equaled approximately $16.2 million. *Id.*

On May 3, 1996, a final AOC was executed which resolved the alleged Clean Water Act violations[3] on a 2,100-acre portion of Borden Ranch north of Dry Creek, whereon the EPA had alleged that 49 .1 acres of waters of the United States had been disturbed. Exh. 66. It was agreed that a 1,368-acre preservation would be set aside as mitigation for these violations and that Tsakopoulos would pay $44,700 to maintain the preserve. *Id.* The AOC also memorialized Tsakopoulos's contention that this preserved land "contain[ed] environmental and wildlife functions in excess of that which is needed to compensate for the alleged impacts to functions of waters of the United States resulting from" Tsakopoulos's plowing activities. Exh. 66. It was agreed that the EPA and/or Tsakopoulos would undertake further studies regarding the possibility that he had undertaken excess mitigation and would, if any dispute thereafter remained, submit the dispute for resolution by the EPA's Regional Administrator and the Corps's District Engineer. *Id.* at 13-14. Finally,

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[3] Tsakopoulos did not admit therein that any violation had occurred. Exh. 66 at 9.

Tsakopoulos agreed to cease further discharges into waters of the United States "except in compliance with an appropriate authorization under the" Clean Water Act. *Id.* at 11. A permit for the 2,100-acre portion on the Sacramento County side which was covered by the AOC issued May 8, 1996. Exh. 593.

In late June of 1996, Tsakopoulos's consultants learned that agents of McCarty Co., which had purchased an 800-acre portion of Borden Ranch in 1995, had illegally plowed and filled in almost half of the wetlands on that portion. Exh. 600. Tsakopoulos directed the consultants to monitor McCarty Co.'s activities on the parcel. *Id.*

By letter dated July 8, 1996, the Corps informed Tsakopoulos's project manager that the wetlands delineation map submitted in March and revised in April had been "reviewed and verified." Exh. 70. That letter also stated, in part:

> Our jurisdiction in this area is under Section 404 of the Clean Water Act. A Department of the Army permit is required prior to discharging dredged or fill materials into waters of the United States. Discharge of dredged material includes but is not limited to any addition, including redeposit, of dredged material, including excavated material, into the waters of the United States which is incidental to any activity including mechanized land clearing, ditching, channelization, or other excavation. Accordingly, a permit will be required PRIOR TO ENGAGING IN ANY EARTHMOVING ACTIVITY in any of the 66.29 acres of waters, including the swales, present on [the San Joaquin County side of] Borden Ranch. . . .

> In addition, two areas on the San Joaquin County portion were deep ripped without Department of the Army authorization. These violations were not resolved with the Administrative Order pertaining to other portions of the ranch. Therefore, a permit application, along with a mitigation plan, should be submitted as soon as possible if your client wishes to retain these fills.

Id. (emphasis in original).

On September 5, 1996, Tsakopoulos and several representatives from the Corps, the EPA, and the offices of certain United States legislators visited Borden Ranch to inspect vernal pool sites. The Corps's representatives reiterated that wetlands on the property could not legally be deep-ripped without a permit and that vernal pools had to be avoided. Exh. 615. Tsakopoulos understood and agreed. In late September of 1996, Tsakopoulos met with Champ to discuss ongoing plowing activities on the San Joaquin County portion of Borden Ranch. Exh. 77. Tsakopoulos indicated that he would file a permit application by mid-October 1996. *Id.* Shortly thereafter, Champ wrote to Tsakopoulos and reiterated his belief that Tsakopoulos then "understood that the discharge of fill material, including redeposit of excavated material for the purposes of installing vineyards in rangeland, requires a Section 404 permit." Champ further wrote that "any earthmoving activities that involve waters of the United States, including swales," required a permit. *Id.*

In November of 1996, Cavanaugh again visited the San Joaquin County portion of the property after having been told by one of Tsakopoulos's employees that deep

ripping had resumed there. He saw that parcels 6, 8, and 9 had been deep ripped and observed evidence of tracks evidently left by deep ripping equipment evincing that some of the swales on those parcels had been deep ripped. He also noted that parcel 10 – which earlier had been sold to Watts Vineyard – had been disced and planted with vineyards.

By the end of 1996 Tsakopoulos had not yet filed a permit application for the remaining activities on Borden Ranch. In a December 23, 1996 letter, he wrote to Champ explaining that "the delay to date in submitting the application" had been caused by the "time-consuming and costly" process of "gathering the voluminous information required for the application." Exh. 92 at 1. Tsakopoulos further mentioned instances involving his contention that the Corps had previously said he could "shallow plow through drainage swales." Tsakopoulos concluded the letter by complaining about the involved federal agencies' continued "effort to prevent ongoing agricultural activities from proceeding on Borden Ranch and stated that "the financial cost to the Partnership of this prolonged situation has been colossal." *Id.* at 3-4. Champ responded with a letter dated January 17, 1997, wherein he stated, *inter alia,* that "the conversion activities you have engaged in [on Borden Ranch] and wish to continue with are not covered by any existing exemptions and require Department of the Army authorization ." Exh. 95. Champ concluded by indicating that expedited processing for any permit application would not be available to Tsakopoulos. "Therefore, if you wish to proceed with additional vineyard installation on Borden Ranch this

Spring, you need to submit your permit application very soon." *Id.*

In late January 1997, Tsakopoulos submitted a permit application for the remainder of the Borden Ranch project: the conversion of approximately 832 acres in Sacramento County and 2,418 acres in San Joaquin County. Exh. 96. It was estimated therein that 77.19 acres of waters of the United States existed in the San Joaquin portion; that only 21.79 acres of these jurisdictional waters would be affected by discing operation;[4] all vernal pools were to be avoided on the San Joaquin County side; "deep plowing will occur in upland areas"; "[w]hen passing through [waters other than vernal pools], the shank will be raised to its maximum height"; and, Tsakopoulos proposed setting aside a preserve totaling approximately 523 acres in mitigation of the proposed plowing effects; of which 51 acres would be wetlands. *Id.* In response to the question on the form application, "Is Any Portion of the Work Already Complete?", Tsakopoulos answered affirmatively and explained as follows:

> Upland areas of Parcel 1 in Sacramento County and Parcels 6, 8, and 9 in San Joaquin County have been deep ripped. Vernal pools and major drainages were avoided. The shank was raised as high as possible when passing through major drainages.

Id.

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[4] A revision provided to the Corps in early February altered these numbers slightly. Of 77.16 acres estimated to constitute wetlands on the San Joaquin County portion, 20.66 acres were predicted to be directly impacted by plowing activities. Exh. 97.

However, there was no mention in this application that deep ripping had occurred within parcel 10 on the San Joaquin County side of Borden Ranch. Further, the record reveals that on many occasions, the shank had not been raised as high as possible as it passed through drainages.

In a letter dated March 21, 1997, the United States Fish and Wildlife Service ("the Service") wrote to the Corps against the January 1997 permit application, stating:

> It has come to the Service's attention that [Tsakopoulos] has recently engaged in unauthorized deep ripping on approximately 400 acres of land in the southern-most San Joaquin portions of the Borden Ranch property. In addition, the Service has been informed that a second potential [Section] 404 violation has occurred on a 200 acre parcel that lies northwest of the San Joaquin project area within the Borden Ranch boundary. This 200 acre section of land was deep ripped and subsequently sold. An undetermined amount of wetland impacts have occurred from these actions.

Exh. 100.

The Service also described the impacts upon wildlife that the proposed plowing would have, as well as the indirect and negative effect that conversion to vineyards could have on vernal pools. *Id* .

Coe sent Tsakopoulos a letter dated March 25, 1997, in which Coe explained that the Corps had received objections to his application from the Service, the EPA, the State of California, and other concerned organizations and citizens. Exh. 101. Copies of those letters of objection

were provided with Coe's letter. Coe also indicated that the Corps's decision on the application would be delayed until April 23, 1997, in order to allow Tsakopoulos the opportunity to rebut these objections or propose mitigation measures appropriate to resolve them. *Id*. Coe added:

> In addition it is apparent that, once again, land preparation activities have been ongoing without Department of the Army authorization. One parcel in San Joaquin County, Parcel 10, has apparently been sold and has already been planted in vineyards. The wetland swales and drainages on this parcel have been filled and the vernal pools within the vineyard have been severely degraded by the surrounding vineyard activities. In addition a large portion of Borden Ranch has been ripped and disced without Department of Army authorization. It is obvious that the ripper shank passed through many of the swales and drainages. Soil was moved into a number of these drainages by turning equipment and at least one vernal pool within this area was directly affected by the ripping and discing operation. It also appears that the ripping equipment is positioned and ready to resume ripping operations.
>
> . . . No further soil manipulation should occur in those areas of Borden Ranch for which a permit has not been issued until a final permit decisio· has been made for the remainder of the property.

Id.

On April 10, 1997, EPA investigators visited· Borden Ranch and observed fully-engaged deep rippers passing over jurisdictional wetlands in parcel 8. On April 14,

1997, the EPA issued an Administrative Order, signed by the Acting Director of the EPA's Water Division, Alexis Strauss, finding that Tsakopoulos had violated the Clean Water Act during plowing activities commencing in October, 1996. Exh. 103. That Order directed Tsakopoulos to provide to the EPA, within five days, written certification "under penalty of law" that activities affecting jurisdictional waters had ceased and to specify the date and time of cessation. *Id.* Tsakopoulos sent a reply letter to Strauss dated April 21, 1997, in which Tsakopoulos questioned the regulatory authority "of both the EPA and the Corps" over his plowing activities on Borden Ranch and said no "unauthorized activities" had been conducted "in any 'waters of the United States,' except for one minor involvement of shallow plowing in a swale – the mistaken action of a party which purchased a parcel at Borden Ranch." Exh. 639 at 2. He declined to certify that the alleged unpermitted discharges had ceased, opining that the EPA had no power to require the certification. *Id.*

Shortly after Tsakopoulos received the Administrative Order from the EPA, his chief consulting firm for the Borden Ranch project, Foothill Associates ("Foothill"),[5] visited parcels 6, 8, and 9 in order to place metal T-posts around the swales and intermittent drainages on these parcels. Sugnet had previously caused the vernal pools thereon to be so marked.[6] Foothill placed stakes 10 to 15

[5] Foothill had replaced Sugnet as the chief consultant on this project sometime between late 1995 and early 1996.

[6] Initially, the markings were problematic because they were not conspicuous enough to be observed by deep ripper operators. They improved over time, but they probably could not be easily seen at night when much of the deep ripping activity occurred.

feet outside of what was perceived to be the limits of jurisdiction to create a buffer zone.

Between April 17 and April 25, 1997, the EPA's wetlands consultant, Dr. Lyndon C. Lee, visited Borden Ranch with some of his employees to document violations of the Clean Water Act on parcels 6, 8, 9, and 10 on the San Joaquin County side. Exh. 156. He was accompanied by an EPA representative each day; most often, that representative was Robert Leidy. While at the property, Leidy observed a deep ripping machine with its shank in the uppermost position. In this position, the cutting edge of the shank was completely out of the ground. Leidy also saw furrows that were two to three feet deep crossing through two swales and a vernal pool on parcel 9 and noted that five vernal pools on parcels 6 and 8 had been completely filled in. On April 25, 1997, Dr. Lee met with Tsakopoulos and discussed Dr. Lee's observations of deep ripping across jurisdictional wetlands. Tsakopoulos initially expressed that there had been no deep ripping on wetlands. Together they visited several jurisdictional features, including a vernal pool in parcel 9 around which five-foot-high metal stakes had been placed. The stakes had been knocked over and marks on the ground indicated that a deep ripper had crossed through the feature several times without its shank raised. Tsakopoulos then conceded that mistakes had been made.

After making his observations on Borden Ranch, Dr. Lee caused to be created a 96-page, 11" x 17" document entitled "Documentation of Impacts" which described the effect that plowing within the studied parcels had on 40 linear features – *i.e.*, swales and intermittent drainages – and on six vernal pools. This document was subsequently revised; the current version is dated April 28, 1999. Exh. 148.

B.

Impacts upon Waters of the United States

Dr. Lee's "Documentation of Impacts" is the most thorough documentation that has been made regarding Clean Water Act violations in the relevant portions of Borden Ranch. Based upon his report and other evidence presented during the bench trial, this Court finds that, under the preponderance of the evidence standard, deep ripping on Borden Ranch caused fill material to be discharged into 35 hydrological features situated in parcels 6, 8, 9, and 10 on the San Joaquin County side of the property. Of these 35 features, 28 are or were swales or intermittent drainages that are hydrologically related to navigable, interstate waters. One feature is a depression that is adjacent to a swale that is hydrologically related to navigable, interstate waters. The remaining six features are or were isolated vernal pools. The "drainage" numbers and "depression" numbers that are referred to herein are taken from Dr. Lee's report and testimony. Exh. 148. A "drainage" number refers to either a swale or an intermittent drainage; a "depression" number denotes an isolated vernal pool.

Parcel 10, shaped roughly like a right triangle, is the northwesternmost parcel on the San Joaquin County side of the property. It shares no boundary with the other parcels on the south side of Dry Creek. Drainage 9 is an approximately 800-foot-long intermittent drainage flowing north to south in the southeast corner of this parcel. It has been completely filled by deep ripping, discing, and the planting of vineyards. The deep ripper shank passed through this drainage several dozen times with its shank down. Drainage 10 is a 1,300-foot-long north/south intermittent drainage flowing to the southern boundary of parcel 10. This wetland also has been nearly completely obliterated due to several passes by a deep ripper with its shank down, subsequent discing and planting with vineyards. Drainage 34 is a swale that runs north to south for approximately 200 feet and reaches the southern border of parcel 10 roughly 850 feet west of drainage 10. This also has been completely filled after several passes with a fully-engaged deep ripper and subsequent discing and planting with grapes. Drainage 35 is another swale, situated near the southwestern corner of parcel 10, which has been deep ripped, disced and planted with vineyards. It was approximately 700 feet long and has been completely filled. Nearby on parcel 10 is drainage 36, which has been completely filled by deep ripping, discing and planting. It had been a swale of approximately 350 feet in length. Along the northwestern boundary of parcel 10 lay a 150-foot long swale, drainage 37, which slopes down toward the northwest and Dry Creek. It also has been completely filled by deep ripping, discing, and planting of vineyards. Approximately 940 feet to the east of that is drainage 38, a 200-foot-long swale also sloping to the northwest and

which has been similarly filled. The final affected feature on parcel 10 is drainage 40, a forked swale totaling 1,450 feet in length and situated in the northeast corner of this parcel. The entire feature is filled after deep ripping; the north-south portion of the swale is planted with vineyards and the east-west stretch is currently used as a dirt road connecting two other roads that run along the eastern and northwestern boundaries of the parcel.

Parcel 8 is a 150-acre portion of Borden Ranch adjacent to and north of Goose Creek. Drainage 5 is an intermittent drainage that flows north to south for 800 feet along the western boundary of the parcel. It has been deep ripped and partially filled in. Drainage 7 is centrally located on the parcel and flows south into Goose Creek. It is an 846-foot-long intermittent drainage and has been partially filled by deep ripping. Drainage 8 is a 1,357-foot-long intermittent drainage which flows south meeting Goose Creek approximately 1,000 feet upstream from drainage 7. It has been deep ripped and partially filled. Depression 2 is a vernal pool located in the northwestern corner of parcel 8, approximately 375 feet west of Mackville Road. The pool had covered an area of roughly 150 square feet, but has been deep ripped, disced, cultivated, and completely filled. Two other, larger vernal pools that lay within approximately 150 feet of this pool were not plowed. Each of them was studied in May of 1997 and March of 1998 and was found to be inhabited by *branchinecta lynchi*, or vernal pool fairy shrimp, a threatened species under the Endangered Species Act. Exh. 138. When the closer of the nearby pools floods, water therein occasionally spills into depression 2, which is located slightly downgrade. Considering the proximity of these

pools and this hydrological relationship with one of them, depression 2 more likely than not served as a habitat for vernal pool fairy shrimp before it was plowed. The last feature on parcel 8 is a 460-foot-long swale – drainage 20 – located in the northeast corner of the parcel. This feature has been deep ripped and disced and, resultantly, partially filled.

Parcel 9 is another 150-acre parcel east of parcel 8 and Mackville Road and north of Goose Creek. Drainage 19 flows for approximately 1,620 feet southward near the western boundary of the parcel and into the Creek. This feature starts as a swale and, after 900 feet, acquires the characteristics of an intermittent drainage. The upper swale portions have been partially filled due to deep rippers plowing to the edge of the feature and depositing soil into the swale. The lower intermittent drainage has been similarly affected by adjacent deep ripping. Drainage 23, a 430-foot-long swale, is another feature adjacent to which there has been deep ripping that has lead to a discharge of fill material into the wetland. Situated in the northeastern corner of parcel 9, drainage 29 is a "Y"-shaped swale totaling 1,077 feet in length into which, due to proximate deep ripping, a small amount of fill material has been deposited. To the west of drainage 29 are drainages 30 and 31. These north-to-south swales have been deep ripped through near where they meet Goose Creek, resulting in significant discharges of fill into each body of water. Upon Dr. Lee's visit to these swales, he observed continuous furrows measuring approximately two feet from the base of the trench to the

top of the mounds on each side and stretching perpendicularly across each feature at intervals of approximately 15 feet.[7] A vernal pool designated depression 1 lay north of drainages 30 and 31. This is the pool whereat Tsakopoulos himself witnessed that plows had knocked over the metal stakes which had surrounded the feature. Approximately 215 square feet in area, this pool has been completely obliterated by deep ripping and discing; however, the pool was deep ripped through in only one direction, rather than two directions like the adjacent uplands. Sampling of the pool in May of 1997 demonstrated the presence of certain vernal pool obligate plant species, including Eryngium and Psilocarphus. These species can only survive in wetlands that are inundated for a substantial portion of the year. However, there has been no showing that vernal pool fairy shrimp inhabited this or any nearby pool. Nor has it been shown that this pool supported any other threatened or endangered species prior to its having been deep ripped. There is credible evidence in the record that certain migratory birds were spotted on other, rather distant portions of Borden Ranch[8] and evidence reveals that relatively small vernal

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[7] Tsakopoulos has attempted to attribute these phenomena to deep rippers passing over the swales with the shank raised to the uppermost position. However, the evidence reveals that the furrows were not caused by shanks tagging the surface.

[8] Over the course of at least seven-days' observations over the course of the year May of 1997 through April of 1998, migratory birds apparently were sighted only once within 1,000 feet of this pool; on June 19, 1997, horned lark were spotted somewhere along drainage 30, which is situated 300 feet from depression 1 at its closest point and 900 feet at its farthest. Exh. 146.

pools like depression 1 can be used by migratory birds for feeding, resting, cover, and breeding. However, it has not been demonstrated that depression 1 was a potential habitat for migratory birds. The final relevant feature in parcel 9 is drainage 32, an intermittent drainage 300 feet in length that has been deep ripped, disced, and planted. Resultantly, this feature is nearly completely obliterated.

The final parcel at issue, number 6, is located on Borden Ranch south of Goose Creek. Depressions 3 through 6 – vernal pools situated in the southwesternmost portion of the parcel – have been completely obliterated by deep ripping and discing. These four pools were each approximately 150 square feet in size. Approximately 175 feet north-northeast of depression 3 there exists a vernal pool – one much larger in size than the plowed pools – in which vernal pool fairy shrimp were found during sampling in May of 1997. Exh. 138. However, thorough sampling of depressions 3 through 6 revealed no threatened or endangered species.[9] There is also insufficient evidence in the record to establish either that vernal pool obligate plant species inhabited these pools, that these pools were hydrologically related to a pool inhabited by a threatened or endangered species, or that such a species had been or would be brought to one or more of these pools via some other mechanism, such as through its attachment to wildlife that had or would frequent other pools. Additionally, it has not been

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[9] In testing each of depressions 3 through 6, twice as much material was sampled as was taken from other vernal pools on Borden Ranch.

demonstrated that any of these pools could potentially serve as habitat for migratory birds.

Turning to the linear hydrological features of parcel 6, drainage 1 is a multi-branched hydrologically-interrelated system broken down by Dr. Lee into six features: four swales, an intermittent drainage, and a depression. Only three of them are alleged to constitute violations. Drainage 1C is in fact an ellipse-shaped depression measuring approximately 38 feet on its longer axis. This depression is adjacent to drainage 1B, which is a swale that flows into drainage 1A and ultimately into Goose Creek. Twelve linear feet at one end of drainage 1C have been deep ripped and disced; resultantly, that end of the depression has been completely filled. Drainage 1D is a 458-foot-long swale and drainage 1E is a 150-foot-long swale. Each has been deep ripped, disced, and partially filled. Situated at the western boundary of parcel 6, drainages 3 and 4, are swales that have been partially filled by deep ripping and discing. A 2,080-foot-long intermittent drainage which flows northward toward Goose Creek – drainage 13 – also has been partially filled by deep ripping and discing. Nearby, drainages 14, 15, and 18 are smaller features which have been deep-ripped across at certain points. Fill has been deposited therein as a result. Finally, drainages 25 and 26 are situated on the eastern "panhandle" portion of parcel 6; these features have been subjected to substantial discharges of fill – drainage 25 has been totally filled – as a result of deep ripping and discing across these wetlands. A 103-foot-long portion of drainage 26 has been completely filled and soil is mounded along where the water in this part of the feature had flowed.

II.

CONCLUSIONS OF LAW

Conclusions of law and further findings of fact necessary to reach certain legal conclusions follow.

A.

Burden of Proof

The EPA bears the burden of proving by a preponderance of the evidence that Tsakopoulos has violated the Clean Water Act; this "simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence." *Concrete Pipe & Products, Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 622 (1993) (quoting *In re Winship*, 397 U.S. 358, 371-372 (1970) (Harlan, J., concurring)) (internal quotations omitted). Tsakopoulos has raised the defense of estoppel to a portion of the EPA's counterclaims. The burden of proving this defense rests upon Tsakopoulos. *See United States v. Omdahl*, 104 F.3d 1143, 1146 (9th Cir. 1997).

B.

The Clean Water Act

The Clean Water Act prohibits "the discharge of any pollutant by any person" from any "point source" into waters of the United States absent compliance with, *inter*

alia, section 1344. 33 U.S.C. §§ 1311(a), 1362(7, 12).[10] A "pollutant" is defined to include "dredged spoil, . . . , rock, [or] sand . . . discharged into water." *Id.* § 1362(6). A "point source" is a "discernible, confined and discrete conveyance," and, under the circumstances of this case, includes a plow. *Id.* § 1362(14); *see also* August 3, 1998, Order at 11-12 (citing cases).

The EPA is empowered to "prescribe such regulations as are necessary to carry out [its] functions" under the Clean Water Act. 33 U.S.C. § 1361(a). Pursuant to this authority, the agency has defined "waters of the United States" to include interstate waters and wetlands, intrastate waters and wetlands "the use, degradation, or destruction of which could affect interstate or foreign commerce," and wetlands adjacent to such waters. 40 C.F.R. § 232.2. "Wetlands" are "areas inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions" and generally include "swamps, marshes, bogs, and similar areas." *Id.* In the preamble to its regulations, the EPA clarified that interstate commerce would typically be affected by the destruction of waters "[w]hich are or would be used as habitat by birds protected by Migratory Bird Treaties[, w]hich are or would be used as habitat by other migratory birds which cross State lines[,] or [w]hich are or would be used as habitat for endangered species." 53 Fed.Reg. 20,764, 20,765 (1988); *see also* 51 Fed.Reg.

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[10] Unless otherwise noted, all references herein to sections are to sections of Title 33 of the United States Code.

41,206, 41,217 (1986) (preamble to the Corps's regulations).[11]

Section 1344 allows the Corps to issue permits allowing the discharge of "dredged or fill material" into waters of the United States. 33 U.S.C. § 1344(a, d). Certain practices are exempt from section 1311(a)'s prohibition of discharges of dredged or fill material and the attendant permit requirement; these activities include "normal farming, silviculture, and ranching activities such as

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[11] The EPA further stated in its preamble that,

> if evidence reasonably indicates that isolated waters are or would be used by migratory birds or endangered species, they are covered by EPA's regulation. Of course, the clearest evidence would be evidence showing actual use in at least a portion of the waterbody. In addition, if a particular waterbody shares the characteristics of other waterbodies whose use by and value to migratory birds as [sic] well established, and those characteristics make it likely that the waterbody in question would also be used by migratory birds, it would also seem to fall clearly within the definition (unless, of course, there is other information that indicates the particular waterbody would not in fact be so used). Endangered species are, almost by definition, rare. Therefore, in the case of endangered species, if there is no evidence of actual use of the waterbody (or similar waters in the area) by the species in question, one could actually assume that the waterbody was not susceptible to use by such species, notwithstanding the particular characteristics of the waterbody. However, in each case a specific determination of jurisdiction would have to be made, and would turn on the particular facts.

53 Fed.Reg. 20,765.

plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices." *Id.* § 1344(f)(1). However, pursuant to regulations promulgated by the EPA, this exemption is limited to "established (i.e., ongoing) farming, silviculture, or ranching operation" and not to "[a]ctivities which bring an area into farming, silviculture or ranching use" or which target an area which "has lain idle so long that modifications to the hydrological regime are necessary to resume operation." 40 C.F.R. § 232.3(c)(1)(ii)(A, B). Tsakopoulos's activities on Borden Ranch thus do not qualify for this exemption. *See* August 3, 1998, Order at 14-18.

Section 1319(b) authorizes the EPA to commence a civil action for appropriate relief, including a permanent or temporary injunction, for violations of the Clean Water Act. A civil penalty for such violations is established by section 1319(d), which provides, in pertinent part:

> Any person who violates section 1311 . . . of this title . . . shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.

The civil penalty for violations occurring after January 30, 1997, has been raised to $27,500. 40 C.F.R. §§ 19.2 & 19.4; Debt Collection Improvement Act of 1996, Pub.L. 104-134, Title III, § 31001(s), 110 Stat. 1321-373 (April 26, 1996)

(codified at 28 U.S.C. § 2461 note). This Court also has jurisdiction to issue injunctive relief to "restrain [any] violation and to require compliance" with the Act. 33 U.S.C. § 1319(b). Therefore, an injunction may be issued which requires restoration, replacement, or mitigation for any damaged jurisdictional waters as may be required by equity. *United States v. Telluride Co.*, 146 F.3d 1241, 1247 (10th Cir. 1998); *United States v. Cumberland Farms of Connecticut, Inc.*, 826 F.2d 1151, 1164 (1st Cir. 1987) (citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982)).

The EPA seeks the imposition of a civil penalty upon Tsakopoulos and an injunction requiring restoration of the features which have been damaged and/or the creation of similar features elsewhere.

C.

Violations of the Clean Water Act

1.

Jurisdictional Features Affected

The swales and intermittent drainages enumerated by Dr. Lee as drainages 1C, 1D, 1E, 3, 4, 5, 7, 8, 9, 10, 13, 14, 15, 18, 19, 20, 23, 25, 26, 29, 30, 31, 32, 34, 35, 36, 37, 38, and 40 are "wetlands" constituting "waters of the United States" within the meaning of 40 C.F.R. § 232.2, and come within the protection of the Clean Water Act. The isolated vernal pool referred to as depression 2 was or would have been inhabited by *branchinecta lynchi*, a threatened species under the Endangered Species Act, and the destruction of this pond affected interstate commerce within the meaning of 40 C.F.R. § 232.2; therefore, this

feature also was a jurisdictional water. Tsakopoulos violated the Clean Water Act when, without a permit from the Corps, he allowed deep rippers to plow and cause fill to be deposited into these features in 1995 through 1997. He further violated the Act by allowing discing of the vernal pool.

Depressions 1, 3, 4, 5, and 6 are isolated vernal pools which have no demonstrated connection with interstate commerce. Given the relatively small size of these pools, and the lack of evidence indicating that any migratory bird or any endangered species have utilized or would utilize them as habitat, these vernal pools are not waters of the United States protected under the Clean Water Act. Therefore, Tsakopoulos did not violate the Act when he caused the deep ripper to pass through or deposit fill into these features.

2.

Estoppel Defense

Tsakopoulos argues that the EPA should be estopped from seeking recovery for any of the violations alleged to have occurred in linear features because he was told that he could drive the deep rippers over the swales and intermittent drainages with the shank raised to its uppermost position and because the government assertedly "was aware" that this would cause the blade of the shank to be dragged through the ground at a depth of six inches or more. Tsakopoulos's Trial Brief at 42-43. The elements of estoppel are "(1) the party to be estopped knows the facts, (2) he or she intends [or it is reasonably believed that he or she intends] that his or her conduct will be

acted on . . . , (3) the party invoking estoppel must be ignorant of the facts, and (4) he or she must detrimentally rely on the former's conduct." *Lehman v. United States*, 154 F.3d 1010, 1016 (9th Cir. 1998) (quoting *United States v. Hemmen*, 51 F.3d 883, 892 (9th Cir. 1995)). This defense fails for several reasons. First, when a deep ripper of the type used on the parcels at issue in this case is operated with its shank raised to the uppermost position, the blade of the shank will not drag through the ground but might occasionally tag the ground when the machine is jostled by bumps on the ground. Second, those agents of the government who instructed Tsakopoulos that the deep rippers could be driven over the swales and intermittent drainages did not believe that the blade of the shank would drag continuously through the ground. Rather, they believed, based upon the statements of Andy Johas, that the blade could be lifted completely out of the ground but could tag raised ground areas in its path. Finally, even if Johas were to have been mistaken when he told the government's agents that the shank could be lifted entirely out of the ground, it is clear that those agents relied upon that advice when they told Tsakopoulos that the deep rippers could be driven over the swales and intermittent drainages. Therefore, the defense of estoppel fails because "the party to be estopped" would not have "know[n] the facts." *Id.* at 1016.

D.

The Civil Penalty

Where there has been a violation of the Clean Water Act, the imposition of a civil penalty is "mandatory." *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1397 (9th Cir.), *cert. denied*, 516 U.S. 955 (1995). However, "[d]istrict courts retain the broad discretion to set a penalty commensurate with the defendant's culpability." *Id.* Under a framework utilized by several courts, known as the "top-down method," the district court first ascertains the maximum civil penalty, and then "determine[s] if the penalty should be reduced from the maximum by reference to the statutory factors." *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 573 (5th Cir. 1996) (citing *Atlantic States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1142 (11th Cir. 1990)); *see also United States v. Mun. Auth. of Union Township*, 150 F.3d 259, 265 (3d Cir. 1998); *Hawaii's Thousand Friends v. City and County of Honolulu*, 821 F. Supp. 1368, 1395 (D.Haw.1993).[12] In

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[12] Another framework, known as the "bottom-up method," has been used by some courts and entails "begin[ning] with the violator's economic benefit from non-compliance . . . and then adjust[ing] up or down based on the court's evaluation of the six factors set out in [section 1319(d)]." *United States v. Smithfield Foods, Inc.*, ___ F.3d ___, ___, 1999 WL 713847, at *11 (4th Cir. Sept. 14, 1999). However, the Clean Water Act "does not require the use of either method." *Id.* at *11 n.7; *see also Mun. Auth. of Union Township*, 150 F.3d at 265 ("it appears that a court is free to use its discretion in choosing the appropriate method"). In light of the fact that, as discussed in section II.D.2.b., *infra*, determining what economic benefit Tsakopoulos derived from violating the Clean Water Act involves a relatively high amount of uncertainty, using the bottom-up method as the baseline for a

enacting section 1319(d), "Congress wanted the district court to consider the need for retribution and deterrence, in addition to restitution, when it imposed civil penalties." *Tull v. United States*, 481 U.S. 412, 422 (1987) (citing 123 CONG. REC. 39,191 (1977)).

The EPA seeks the imposition of a civil penalty of $875,000, which represents the product of multiplying 35 affected features by $25,000. Tsakopoulos argues that, if a civil penalty is to be imposed, it should not exceed $97.26 based upon the penalty imposed as part of a Consent Decree entered April 28, 1997, in *United States v. Simpson Timber Co.*, Case No. CIV. S-96-1890 LKK GGH, a case formerly pending in this United States District Court. Tsakopoulos's Trial Brief at 55 (as corrected Aug. 11, 1999); *id.* at 36 n.16 (obtaining the $97.26 figure by dividing the $30,000 penalty agreed to in *Simpson Timber* by the 987 acres of lands affected in that case, and by multiplying this per-acre amount by the 3.2 acres allegedly affected in this case).

1.

The Maximum Civil Penalty

Under section 1319(d), the maximum penalty depends upon two numbers: the number of "day[s]" the Act is violated and the number of "violation[s]" that have occurred. The EPA argues that the number of violations in this case equals the number of times that a deep ripper passed through a water of the United States plus the

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civil penalty would not be desirable. Therefore, the top-down method will be utilized in this case.

number of times that a vernal pool was disced. EPA's Trial Brief at 27 & n.6. The EPA estimates that 29 swales and intermittent drainages were passed through with a deep ripper a total of 1,100 times. *Id.* at 27-28 n.7.[13] No estimate is offered for how many violations occurred in the vernal pools. The EPA also contends that every day since these violations occurred constitutes another day to be used in calculating the maximum penalty because fill has been allowed to remain in a jurisdictional water. *Id.* at 28 (citing *United States v. Key West Towers, Inc.*, 720 F. Supp. 963 (S.D.Fla.1989), and *United States v. Ciampitti* ("*Ciampitti II*"), 669 F. Supp. 684 (D.N.J.1987)). The EPA failed to estimate the maximum civil penalty, suggesting only that the maximum penalty for all violations "is in the hundreds of millions of dollars." *Id.* at 36. Nor has Tsakopoulos attempted to identify either the number of violations, the relevant number of days, or the maximum civil penalty applicable in this case.

A "violation" within the meaning of section 1319(d) occurred whenever an unpermitted discharge took place. The Act defines a "discharge" as an "addition" of a pollutant to a jurisdictional water. 33 U.S.C. § 1362(12). The EPA's argument that merely failing to remove fill from a jurisdictional water constitutes a separate violation of the Clean Water Act is unpersuasive. Rather, the day on which a discharge occurred is the only day that

[13] This stems from the hypothesis that all of these features were crossed in one direction 25 times and that 15 of them were crossed in another direction an additional 25 times. *Id.* Therefore, the EPA estimates that, on average, each linear feature was deep ripped approximately 38 times.

will be counted in determining the maximum penalty. Further, the features which have been deep ripped involve more than one violation of the Clean Water Act because of the repeated passes by the deep rippers over these features. The parties apparently agree that each pass constitutes a separate violation. Tsakopoulos concedes that a few passes through certain features might have accidentally occurred. The evidence reveals that some of the linear features, including drainages 30 and 31, were only deep ripped a few times in localized areas. Other features were simply too small to conclude that they had been passed through with a deep ripper more than 5 to 10 times. Considering its size, the vernal pool was most likely deep ripped and/or disced approximately 10 times. On average, each of the 29 linear jurisdictional features was passed through with a fully-engaged deep ripper approximately 12 times. Each of these passes-through caused fill to be deposited into waters of the United States. Therefore, Tsakopoulos committed 358 violations of the Clean Water Act.[14] Finally, eyewitness evidence reveals that, in April of 1997, deep ripping of unspecified jurisdictional features occurred on parcel 8. However, there is insufficient evidence to establish that the witnessed activity, or any other deep ripping activity, affected any of the features listed in part II.C.1., *supra*, at any time after January 30, 1997, – the date after which the penalty for violating the Clean Water Act

[14] The total violations number is calculated by multiplying the average number of passes by a deep ripper (12) by the number of linear jurisdictional features (29), which equals 348; and then adding to this number the 10 violations in the vernal pool, which yields 358.

increased to $27,500. 40 C.F.R. § 19.2.[15] Thus the maximum penalty applicable to each of the 358 violations is $25,000. Therefore, the maximum civil penalty applicable in this case is $8,950,000.

2.

Statutory Factors

a.

The Seriousness of the Violations

The first statutory factor concerns the seriousness of the violations, their number and continuous nature. *Sierra Club, Lone Star Chapter*, 73 F.3d at 574; *Pub. Interest Research Group of N.J. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 79 (3d Cir. 1990); *Hawaii's Thousand Friends*, 821 F. Supp. at 1395; *Natural Resources Defense Council, Inc. v. Texaco Ref. & Mktg., Inc.*, 800 F. Supp. 1, 23 (D. Del. 1992). The EPA argues that this factor weighs in favor of a significant penalty in light of the number of discharges, the duration those discharges have remained in the jurisdictional waters, and the impact deep ripping has had on the hydrological functioning of the affected linear features and on the ability of vernal pools to support endangered species. Tsakopoulos counters that, compared with the impact of the violations which were alleged in *Simpson Timber*, his violations in this case are less serious.

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[15] In its trial brief, the EPA notes the increased maximum civil penalty applicable to violations after January 30, 1997, but does not argue that any of Tsakopoulos's violations are subject to this heightened penalty.

Further, Tsakopoulos argues that the wetlands on Borden Ranch remain functional and flowing.

Tsakopoulos has not shown that the settlement reached in the *Simpson Timber* case has any relevance to the determination of an appropriate civil penalty in this case. *Simpson Timber* was resolved by a consent decree rather than through litigation and adverse judgment. Besides, Tsakopoulos focuses only on the monetary amount of the civil penalty in *Simpson Timber* and disregards the restoration measures required by the consent decree. Some of these measures created ecological preserve properties to assist in the preservation of valuable natural resources, including vernal pools. These restoration measures could have been imposed in lieu of a more significant civil penalty consistent with the objectives of the Clean Water Act.

However, Tsakopoulos correctly points out that his asserted violations of the Clean Water Act affected a relatively small area of jurisdictional waters. As Dr. Lee's findings show, the aggregate area filled by deep ripping is 2.34 acres of wetlands. This number includes approximately 0.02 acres of isolated vernal pools over which the government argued jurisdiction existed. However, the EPA's jurisdiction over these pools extends only to the one known as depression 2, which, according to Dr. Lee's testimony, covered approximately 150 square feet. Although the evidence adduced at trial pertaining to the amount of jurisdictional wetlands affected was not clear enough to ascertain the exact acreage of land adversely affected by Tsakopoulos's wrongful filling activities, it demonstrated that approximately 2 acres of jurisdictional wetlands were caused to be filled by deep ripping.

The hydrology of each of the 30 features affected has been altered significantly. Several of them – drainages 9, 10, 34, 35, 36, 37, 38, and 40 and depression 2 – are completely obliterated. Many of the remaining features have been "clipped" and/or partially filled. While the precise environmental impact these violations have had or will have on the effected [sic] wetlands is not pellucid as to some of the features, the damage attributable to these violations, including the diminished effectiveness of these features in filtering pollutants in the water system and the decrease in exotic plant and animal life, will accumulate well into the future. Dr. Lee credibly testified about these anticipated effects. Tsakopoulos's contrary contention that these features have not been significantly affected by the plowing and deep ripping activity is unpersuasive. However, considering the nature of Tsakopoulos's violations, imposition of the maximum penalty allowed under law is not required. But the nature of his deep ripping and plowing activity degraded or destroyed wetlands considered valuable by Congress and warrants a substantial civil penalty.[16]

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[16] Congress has made the following findings concerning wetlands:

> (1) wetlands play an integral role in maintaining the quality of life through material contributions to our national economy, food supply, water supply and quality, flood control, and fish, wildlife, and plant resources, and thus to the health, safety, recreation, and economic well-being of all our citizens of the Nation; (2) wetlands provide habitat essential for the breeding, spawning, nesting, migration, wintering and ultimate survival of a major portion of the migratory and resident fish and wildlife of the Nation; including migratory birds, endangered species, commercially and recreationally important finfish, shellfish and other aquatic organisms, and contain many unique species and communities of wild plants;
>
> . . . .
>
> (4) wetlands, and the fish, wildlife, and plants dependent on wetlands, provide significant recreational and commercial benefits, including – . . . (C) fishing, hunting, birdwatching, nature observation and other wetland-related recreational activities . . . ;
>
> (5) wetlands enhance the water quality and water supply of the Nation by serving as groundwater recharge areas, nutrient traps, and chemical sinks;
>
> (6) wetlands provide a natural means of flood and erosion control by retaining water during periods of high runoff, thereby protecting against loss of life and property;
>
> (7) wetlands constitute only a small percentage of the land area of the United States, are estimated to have been reduced by half in the contiguous States since the founding of our Nation, and continue to disappear by hundreds of thousands of acres each year. . . .

16 U.S.C. § 3901(a).

b.

The Economic Benefit Resulting from the Violations

The next factor concerns whether Tsakopoulos derived an economic benefit from the deep ripping activity on federal wetlands. The economic benefit flowing to a violator must be considered "to prevent [the] violator from profiting from [his] wrongdoing." *Mun. Auth. of Union Township*, 150 F.3d at 263. The goal is "to remove or

neutralize the economic incentive to violate environmental regulations." *Id.* at 264; *see also Smithfield Foods*, ___ F.3d at ___, 1999 WL 713847, at *12; *Pub. Interest Research Group of N.J.*, 913 F.2d at 80. "[T]he precise economic benefit a polluter has gained by violating [the Act] may be difficult to prove, so '[r]easonable approximations of economic benefit will suffice.' " *Smithfield Foods*, 1999 WL 713847, at *12 (quoting and altering S. REP. NO. 50, 99th Cong., 1st Sess. 25 (1985)); *see also Sierra Club, Lone Star Chapter*, 73 F.3d at 576; *Pub. Interest Research Group of N.J.*, 913 F.2d at 80. The EPA suggests that "Tsakopoulos benefitted economically in several ways as a result of proceeding with deep ripping without obtaining a permit." EPA's Trial Brief at 32. The EPA argues he avoided the cost of pursing authorization to deep rip the jurisdictional features and mitigation costs that would have been required by the government for him to receive a permit. *Id.* at 33. Second, he saved interest costs that would have accrued had he gone through with the permitting process and, resultantly, not been able to sell parcels 6, 8, 9, and 10 as quickly as he did. Third, he received profit from those sales sooner than he would have if a permit application had been properly submitted and processed. *Id.* The EPA's economics expert testified that the total economic benefit, obtained by adding these (and certain other) elements together, equals $1,039,628.[17] Also, the EPA

[17] According to the EPA's expert, from avoiding the cost of mitigation, Tsakopoulos benefitted by holding this money himself for an economic benefit of $416,687. From early sales, he benefitted $601,359; and from failing to properly flag jurisdictional wetlands on parcel 10 prior to deep ripping, he saved $21,582.

points to the tremendous profit that Tsakopoulos has earned as a result of his conversion activities on Borden Ranch. Tsakopoulos purchased parcels 6, 8, 9, and 10 for $605,323 and has since sold this land for $3,123,914. However, he incurred approximately $673,000 in land preparation, selling, interest, and other costs in the interim.[18]

Tsakopoulos argues that he has not benefitted economically at all from the violations. The properties at issue were converted for use as vineyards and then sold at a price per gross acre, rather than per farmable acre, so that there was no economic incentive to fill the wetlands, and no benefit from doing so. Tsakopoulos's Trial Brief at 54. Tsakopoulos also points out that he did expend *some* additional time and money in attempting to comply with the Clean Water Act. *Id.*

The acreage involved in these violations constitutes a minuscule fraction of the total land converted to vineyards in parcels 6, 8, 9, and 10. Therefore, deeming his profits from the sale of these parcels to be the economic benefit derived solely from his violations would not reflect the extent of his economic gain. But Tsakopoulos did save money by selling the relevant parcels earlier than he would have realized had he taken the time to comply with the Act. It is clear that he moved with

[18] Also, according to the EPA's expert, Tsakopoulos has sold half of the land on Borden Ranch for approximately $17 million, and the remaining portion is worth approximately $7.7 million. Thus, Tsakopoulos stands to make a gross profit of roughly $16.4 million from the Borden Ranch deal, without taking into account conversion, interest, and other costs.

celerity in his deep ripping activities because of the prospect of making an enormous profit, the immediate availability of this profit, and the ability to avoid expense and delay he perceived attended to action that would ensure compliance with the Clean Water Act. Thus he risked damaging rare federal wetlands because of his motivation to reap economic gain. This factor favors a substantial penalty, but the extent of the economic benefit is uncertain. Where the precise economic benefit is difficult to determine, "reasonable approximations of economic benefit will suffice." *Pub. Interest Research Group of N.J.*, 913 F.2d at 80.

c.

Any History of Such Violations

The parties dispute what should be considered when evaluating the history Tsakopoulos has had with the Act and what weight should be given to that history. Tsakopoulos's past alleged violations of the Act include those committed prior to 1993 at sites other than Borden Ranch, those committed on the Castlehill parcel in the fall of 1993, those committed on the Prudential parcel in the fall of 1994, and others committed on the Sacramento County side of Borden Ranch in 1995. Tsakopoulos points out that the AOC entered into on May 3, 1996, fully considered these violations and reached a settlement that sufficiently penalized Tsakopoulos even though he was not required to admit wrongdoing. Tsakopoulos indicates that the AOC fully required him to make amends for what occurred on the Sacramento County side of Borden

Ranch, and reflects a penalty equal to what the government was likely to have obtained had the matter been fully prosecuted instead of settled. When the EPA considered an appropriate penalty and mitigation in the AOC, and extracted from Tsakopoulos 1,368 acres of land for preserves and nearly $45,000, the EPA must have considered and intended to resolve the Sacramento County and all prior violations of the Clean Water Act (and violations of the Endangered Species Act) that Tsakopoulos had committed. While his history is problematic, the federal government dealt with it and appears to have fully considered it in the AOC. The EPA disagrees, contending that since Tsakopoulos committed further violations of the Act he "vitiated" the AOC by breaching the promise he made in the AOC that he would not engage in further violations. *See* Exh. 66 at 11. Therefore, the EPA argues that the parties' settlement reflected in the AOC should be disregarded and the Court should begin anew when considering a penalty for Tsakopoulos's current violations in light of similar violations he allegedly committed in the past.

In determining the history of all of the violations, the Court is required to consider the duration and nature of them all, "including whether the violations are perpetual or sporadic." *United States v. Smithfield Foods*, 972 F. Supp. 338, 349 (E.D.Va.1997) (citing cases), *rev'd in part on other grounds*, ___ F.3d ___, 1999 WL 713847 (4th Cir. Sept. 14, 1999). A review of the AOC, in light of the trial testimony concerning Tsakopoulos's history, reflects Tsakopoulos had problems complying with the requirements of the Clean Water Act, but leads to the conclusion that the penalty under consideration now should supplement

rather than supplant the governmental enforcement action reflected in the AOC. The AOC represents a final agency enforcement action that evinces the government utilized considerable expertise as it diligently concluded an administrative agreement with Tsakopoulos which fosters the goals of the Act. No reason has been presented justifying undoing the agreement reached in the AOC. However, Tsakopoulos's violation of the AOC itself by reneging on his assurance to comply with the Act is of historical significance and weighs in favor of a more severe penalty. Although all of Tsakopoulos's past history is considered, it is not evaluated in the light desired by the EPA.

d.

Any Good-Faith Efforts to Comply with Applicable Requirements

The next factor concerns whether Tsakopoulos made good faith efforts to comply with the Clean Water Act. This factor generally focuses on whether the violator took any actions to decrease the number of violations and whether he made an effort to mitigate the impact of his violations. *Smithfield Foods*, 972 F. Supp. at 350 (citing cases).

The EPA contends that Tsakopoulos undertook virtually no efforts to comply with the Clean Water Act and regulations promulgated thereunder, disregarded the government's warnings and "chose to go forward in San Joaquin County without a permit and in a manner that essentially assured that the rippers would impact jurisdictional waters." EPA's Trial Brief at 34, 35. The evidence

indicates that Tsakopoulos's agents utilized the deep ripping equipment almost 24 hours per day with little or no supervision at night, and in a manner which seemed impervious to the substantial risk of ripping and depositing fill into federal wetlands. These facts strongly indicate a lack of good faith.

Tsakopoulos points out that he told the government about his plans for Borden Ranch as soon as he realized he would purchase the property and there was evidence that he made some efforts to mark jurisdictional features. However, the EPA correctly asserts that Tsakopoulos repeatedly failed to adhere to the regulatory scheme and occasionally acted as though he did not recognize the authority of the Corps and the EPA in his dealings with them. And although Tsakopoulos quibbled with the Corps's enforcement authority, he knew that the Corps had clearly directed him not to deep-rip federal wetlands. However, the evidence does reveal that Tsakopoulos apparently intended to avoid the necessity of obtaining a permit on parcels 6, 8, 9, and 10 by avoiding deep ripping jurisdictional waters therein. He sought and received the government's guidance regarding what activities he could undertake without a permit. While certain federal officials apparently anticipated that he would submit permit applications for these parcels before he deep ripped them it is unclear why he would need a permit if he intended to avoid jurisdictional waters.

Yet the evidence reveals that Tsakopoulos expended little effort to comply with the Act prior to the summer of 1996. It is undisputed there was deep ripping taking place on parcels 6 and 10 prior to the preparation and verification of a jurisdictional wetlands delineation map,

which did not take place until the spring and summer of that year. Final Pretrial Order filed May 27, 1999, ("the Final Pretrial Order") at 4-5. Without such a map, it is unclear how Tsakopoulos's agents could successfully avoid all jurisdictional features. The evidence further shows that in September of 1996 some flagging and staking was done on the San Joaquin County side, particularly around vernal pools. Nevertheless, deep ripping of jurisdictional features still occurred. Tsakopoulos testified that he relied upon his agents to ensure compliance with the government's guidance regarding driving over the swales and intermittent drainages. But these agents had an unvigilant attitude towards compliance with the Clean Water Act on Borden Ranch. Finally, between September of 1994 and September of 1996, Tsakopoulos deliberately obfuscated his understanding of the Corps's guidance respecting driving over vernal pools and undermined the Corps's enforcement authority by wrongly stating the agency gave him confusing guidance as to the nature of the contact he could have with jurisdictional waters. He knew he was not authorized to deep rip any jurisdictional features.[19] These findings weigh against good faith. While confusion did exist as to whether Tsakopoulos needed a permit prior to deep ripping outside jurisdictional features, Tsakopoulos understood his responsibility

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[19] The government's internal discussions about the extent of its authority under the Clean Water Act, and the portion of that debate that surfaced at one of Tsakopoulos's meetings with federal officials, are irrelevant since Tsakopoulos knew that the Corps's direction to him about his activities on jurisdictional waters was clear and consistent.

to avoid federal jurisdictional features as early as September of 1994. Yet some of his agents failed to avoid those features. For instance, the evidence demonstrates that there was no serious effort to avoid waters of the United States when deep rippers plowed nearly all of parcel 10. This is indicative of the absence of a good faith attempt to comply with the Act. This factor favors the imposition of a significant civil penalty.

e.

The Economic Impact of the Penalty on the Violator

Another factor concerns the economic impact a civil penalty would have on Tsakopoulos. However, he has entered into a stipulation with the EPA, filed under seal March 12, 1999, wherein he agrees in substance that the economic impact of a penalty on him need not be considered in determining whether the civil penalty imposed should depart from the maximum allowed under the Clean Water Act. Further, in the Final Pretrial Order, Tsakopoulos agreed that he "has the financial resources to respond to any judgment which the Court may make." *Id.* at 21. Therefore, this factor does not affect the severity of the penalty.

f.

Other Matters Required by Justice

Further, section 1319(d) requires consideration of "such other matters as justice may require" in fashioning a civil penalty. The EPA argues that this Court ought to consider the need to deter "the regulated community"

from violating the Clean Water Act through the imposition of a severe civil penalty. EPA's Trial Brief at 36. Otherwise, the EPA argues, the government's regulatory program could be subverted. Tsakopoulos does not dispute these contentions. This factor is relevant and does weigh in favor of the imposition of a more severe civil penalty. *See United States v. Mun. Auth. of Union Township*, 929 F. Supp. 800, 809 (M.D. Pa. 1996), *aff'd*, 150 F.3d 259 (3d Cir. 1998).

No other matter is asserted to be, or appears to be, pertinent to this determination. Consequently, the amount of the civil penalty is determined.

3.

The Amount of the Civil Penalty

Although the maximum civil penalty under the statute is $8,950,000, the EPA seeks a lesser penalty, and injunctive relief that would require Tsakopoulos to make appropriate restoration for depriving the United States government and its people of wetlands. The EPA's approach bespeaks that public policy interests will be served best by restoration on Borden Ranch and/or other properties owned by Tsakopoulos. This would foster the congressional goal of protecting federal wetlands. "Congress has determined that 'the . . . destruction of the Nation's wetlands is causing [such] serious, permanent ecological damage,' . . . that wetlands merit protection by laws. . . . " *United States v. Larkins*, 657 F. Supp. 76, 86 (W.D. Ky. 1987) (quoting STAFF OF SENATE COMM. ON THE ENVIRONMENT, 95TH CONG., 2D SESS., A LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1977, 869-70 (Comm. Print

1978)). The issue is what monetary legal penalty should be imposed and whether Tsakopoulos could avoid any portion of that penalty by restoring damaged or destroyed wetlands. On balance, the statutory factors dictate that Tsakopoulos either must pay a stiff civil penalty or make appropriate restoration for depriving the nation of wetlands that support wildlife and endangered species. This is consistent with the EPA's policy of accepting "consent decree provisions which allow the reduction of a civil penalty assessment in recognition of the defendant's undertaking an environmentally beneficial 'mitigation project.' " *Sierra Club, Inc. v. Elec. Controls Design, Inc.*, 909 F.2d 1350, 1354 n.6 (9th Cir. 1990) (quoting the EPA's "Clean Water Act Penalty Policy for Civil Settlement Negotiations" (1986)).

The relative seriousness of Tsakopoulos's violations and his lack of earnest effort to comply with the Act merit a significant penalty in order to achieve appropriate retribution. Tsakopoulos realized his obligation to ensure his agents avoided deep ripping federal wetlands but failed to devise a ripping operation sufficient to avoid these jurisdictional features. The plan developed created a plain and obvious risk that others would rip these features because it authorized ripping to occur almost continuously without enough supervision, and even in the wee hours of the morning and night. The haste involved in this ripping activity was driven by a profit motive – to make parcels of Borden Ranch conducive for vineyards so that sales of the properties could be consummated. The economic benefit Tsakopoulos obtained from his haste enabled him to realize a quicker sale of deep ripped

property, which included deep ripped jurisdictional wetlands. Reaping such benefits at the expense of damaging rare federal wetlands is intolerable under the Act and preponderates toward a significant penalty to achieve the goal of deterrence.

On balance, all the considered factors warrant imposition of a civil penalty pursuant to 33 U.S.C. § 1319(d). Tsakopoulos is fined $1,500,000 for his 358 violations of the Clean Water Act. However, Tsakopoulos may suspend payment of $1,000,000 of this penalty and reduce it to $500,000 if he completes the restoration measures identified in the injunctive relief portion of this Order. If Tsakopoulos elects to undertake such restoration measures, he must file a written notice so stating within 30 days of the date on which this Order is filed.

E.

Injunctive Relief

The restoration measures favored by the EPA are given considerable deference because of its expertise in achieving the goals of the Clean Water Act. However, to institute those measures Tsakopoulos would have to cooperate with the involved federal agencies. Although it appears that the cost of the restoration sought is significantly less than the $1,000,000 civil penalty which will be held in abeyance should Tsakopoulos elect to do the restoration,[20] reducing the penalty in favor of restoration

[20] If Tsakopoulos does not elect to do the restoration this civil penalty could be used by the EPA to do restoration itself elsewhere.

would be instified under the reasoning that Tsakopoulos's election to do the restoration bears upon the necessity of a civil penalty. *Ciampitti II*, 669 F. Supp. at 686-87. Should Tsakopoulos voluntarily elect to cooperate with these agencies, that would indicate his good intention to improve the damage that he allowed his agents to cause to jurisdictional features of the United States. As observed by the Court in *United States v. Ciampitti*, 615 F. Supp. 116, 125 (D.N.J. 1984), Tsakopoulos's "good faith in preparing and implementing a restoration plan is a relevant factor in assessing the size or necessity of civil penalties."

Accordingly, if Tsakopoulos makes the election to have $1,000,000 of the imposed civil penalty held in abeyance pending determination of whether he has made such restoration, he shall cooperate with the EPA and the Corps in arranging for the preparation of a restoration plan covering at least four acres in and near Goose Creek, Dry Creek, and/or on other appropriate areas on property owned by Tsakopoulos ("the applicable land").[21] Four acres is approximately twice the acreage directly affected by his unlawful deep ripping activities. In light of the indirect impact that violations like those committed by Tsakopoulos have on jurisdictional waters downstream, the EPA's policy is to require restoration at a two-to-one ratio. *See* EPA's Trial Brief at 39. Tsakopoulos does not dispute that, if he had applied for a permit to deep rip the 30 jurisdictional features, he would have been required to undertake restoration of an area determined by using this ratio. Therefore, mitigation on four acres of

[21] The EPA must agree to the site selected for restoration.

wetlands is appropriate. The restoration plan will be prepared by an independent environmental consulting firm selected by the EPA and will be subject to EPA approval. Tsakopoulos shall cooperate in the development of this restoration plan by (i) providing access to the applicable land, and (ii) reimbursing the environmental consultant selected by the EPA for the cost of developing the mitigation plan, and (iii) assisting the United States in implementing this plan.[22] To serve the goals of restoration, this activity may include fill removal, creation of buffers, installation of culverts to channel water flow, and revegetation.

III.

CONCLUSION

For the above-stated reasons, the Court finds that Angelo K. Tsakopoulos committed three hundred fifty-eight (358) violations of the Clean Water Act when he caused fill to be discharged into waters of the United States on parcels 6, 8, 9, and 10 of Borden Ranch. A civil penalty pursuant to 33 U.S.C. § 1319(d) is imposed in the amount of one million five hundred thousand dollars ($1,500,000). If Tsakopoulos files a notice that he elects to have held in abeyance his obligation to pay one million dollars ($1,000,000) of the civil penalty within thirty (30) days of the date this Order is filed, then the EPA shall file

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[22] The restoration work should be performed by an independent firm selected by the EPA. Tsakopoulos shall cooperate in providing access to the applicable land and shall pay the costs for implementing the mitigation plan.

a proposed injunction which encompasses the relief described in its Trial Brief and section II.E., *supra*, within sixty (60) days of the date this Order is filed; a Judgment would then be entered imposing a five hundred thousand dollar ($500,000) civil penalty and an injunction requiring restoration. If the restoration is not thereafter completed as Ordered, the EPA may file a motion seeking appropriate relief, which may include the re-imposition of all or part of that portion of the civil penalty which was held in abeyance. However, if Tsakopoulos does not timely elect to undertake the restoration, a Judgment will be entered imposing the full one million five hundred thousand dollar ($1,500,000) civil penalty.

IT IS SO ORDERED.

DATED: November 8, 1999

/s/ Garland E. Burrell, Jr.
GARLAND E. BURRELL, JR.
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BORDEN RANCH PARTNERSHIP and ANGELO K. TSAKOPOULOS, Plaintiffs, v. UNITED STATES ARMY CORPS OF ENGINEERS and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Defendants.	)	CIV. S-97-0858 GEB JFM
	)	ORDER*
	)	(Filed Feb. 10, 2000)
And Related Counterclaim.	)	

Plaintiff-Counter-defendant Angelo K. Tsakopoulos ("Tsakopoulos") moves to amend the findings set forth in the November 8, 1999, Findings of Fact and Conclusions of Law ("Findings and Conclusions") pursuant to Rule 52(b) of the Federal Rules of Civil Procedure.[1] Defendant-Counterclaimant United States Environmental Protection

* This case was determined to be suitable for decision without oral argument. L.R. 78-230(h).

[1] Unless otherwise indicated, all references herein to Rules are to the Federal Rules of Civil Procedure.

Agency ("the EPA") opposes the motions.[2] For the reasons set forth below, the motions are denied.

Rule 52(a) "requires findings of fact in judge tried actions. The purpose of this rule is so appellate courts may have a clear understanding of the basis of the decision." *Weyerhaeuser Co. v. Atropos Island*, 777 F.2d 1344, 1352 (9th Cir. 1985) (internal quotation marks and citation omitted). A district judge should state "the preliminary and basic facts" on which his decision rests. *Unt v. Aerospace Corp.*, 765 F.2d 1440, 1444 (9th Cir. 1985) (quoting *Dalehite v. United States*, 346 U.S. 15, 24 n.8 (1953)). Rule 52(b) provides that, on motion, "the court may amend" findings pursuant to Rule 52(a), "or make additional findings." "Motions under Rule 52(b) are primarily designed to correct findings of fact which are central to the ultimate decision; the Rule is not intended to serve as a vehicle for a rehearing." *Davis v. Mathews*, 450 F. Supp. 308, 318 (E.D. Cal. 1978); *accord* 9 Moore's Federal Practice 3d § 52.60[s] (1999).

Tsakopoulos argues that certain more specific findings are required "to sufficiently and precisely indicate and afford a clear understanding of the factual bases and grounds for the Court's ultimate conclusions and decision in this matter." Plaintiff's Memorandum of Points and Authorities ("Pltf. Mem.") at 1-2. First, Tsakopoulos requests specification of the precise depths at which the deep ripper shanks were dragged through jurisdictional features in violation of the Clean Water Act. *Id.* at 3-4.

[2] Tsakopoulos has filed two motions for more specific findings: one on December 2, 1999, and a supplemental motion on December 8, 1999. Both are resolved by this Order.

Since Tsakopoulos fails to articulate the relevance of these precise depths, this aspect of the motion is denied. Second, Tsakopoulos seeks particularization of the following facts assertedly relevant to his estoppel defense: (i) the "circumstances, location and type of [deep ripping] equipment" which a certain EPA witness had observed with its shanks in the uppermost position, (ii) to which government agents Tsakopoulos and/or his agent had represented that the deep ripper shanks could be raised completely out of the ground, (iii) which specific statements constituted these representations, and (iv) what "specific actions" government agents had undertaken in reliance upon these statements. *Id.* at 4-5. However, the Findings and Conclusions sufficiently set forth the facts which support the conclusion that Tsakopoulos's estoppel defense had not been proven, *see* Findings and Conclusions at 7, 17, 30, and Tsakopoulos has not shown how further detail would be pertinent. Third, Tsakopoulos asks for clarification of certain facts regarding the existence of endangered species in depression 2 which was found to have been plowed in violation of the Clean Water Act. He seeks specification of (i) whether the Court found that depression 2 was a "hydrologically-isolated vernal pool," (ii) whether the Court found any "actual . . . presence" of endangered species in the feature and/or whether the feature was an "*actual* or *potential*" habitat for such species, (iii) the "historical frequency and duration" of spillage from a proximate vernal pool, (iv) over what distance this spillage was found to occur, (v) whether endangered species are capable of surviving transportation from one vernal pool to another via overland storm water flow, and (vi) whether

depression 2 had specific physical characteristics which made it a viable habitat for endangered species. Pltf. Mem. at 5-6. The findings regarding depression 2 are sufficiently set forth in the Findings and Conclusions and patently incorporate some of the additional findings which Tsakopoulos now seeks. *See* Findings and Conclusions at 20-21. In any event, Tsakopoulos has failed to show how more detail would be necessary and/or relevant to the factual finding that depression 2 had more likely than not served as a habitat for a certain endangered species. *Id.* at 21. Therefore, this aspect of Tsakopoulos's motion is denied.

Tsakopoulos next seeks clarification of the precise acreage and the widths of each linear feature into which fill was deposited by his deep ripping activities. Pltf. Mem. at 6. However, the Court previously expressed that "the evidence adduced at trial pertaining to the amount of jurisdictional wetlands affected was not clear enough to ascertain the exact acreage of land adversely affected." Findings and Conclusions at 36. Further, Tsakopoulos has not shown how more specificity is necessary or would be relevant. Tsakopoulos also seeks a specific finding of the "reasonably approximate amount" of the economic benefit he derived from violating the Clean Water Act. Pltf. Mem. at 6-7. As Tsakopoulos notes, the Court found that a "relatively high amount of uncertainty" was involved in the calculation of economic benefit in this case. *Id.* at 6 (citing Findings and Conclusions at 31 n.12). Further, as was explained in the Findings and Conclusions, precise numbers are unnecessary. *See* Findings and Conclusions at 38, 40. The EPA's unrebutted expert testimony that Tsakopoulos benefited approximately $1 million was

based upon facts which Tsakopoulos has not disputed, and these facts are set forth sufficiently in the Findings and Conclusions. *Id.* at 38-39 & n.17. Therefore, this aspect of the motion is denied. Tsakopoulos also requests that the Findings and Conclusions be made more specific regarding how he "depriv[ed] the nation of wetlands that support wildlife and endangered species" and why the Court concluded his violations were relatively serious. *Id.* at 46. Since he has failed to demonstrate the necessity for further explanation of these findings than was stated in the Findings and Conclusions, this aspect of the motion is also denied.

Finally, in Tsakopoulos's supplemental motion, he seeks clarification of the phrase "independent environmental consulting firm." *Id.* at 49. Since that phrase has been adequately clarified in an Order filed December 17, 1999, the supplemental motion is moot.

For the reasons stated, Tsakopoulos's motions for more specific findings are denied.

IT IS SO ORDERED.

DATED: February ___, 2000

/s/ Garland E. Burrell, Jr.
GARLAND E. BURRELL, JR.
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BORDEN RANCH PARTNERSHIP, et al., Plaintiffs, v. UNITED STATES ARMY CORPS OF ENGINEERS, et al., Defendants.	CIV. S-97-0858 GEB JFM FINAL ORDER (Filed March 3, 2000)
And Related Actions.	

On February 28, 2000, the parties jointly submitted a [Proposed] Final Judgment to which both sides have assented. Because the proposed judgment satisfies the directives set forth in the February 14, 2000, Order, the stipulated conditions set forth in the [Proposed] Final Judgment will issue as part of this Final Order, with one change described below.

The parties propose the issuance of a permanent injunction which proscribes Tsakopoulos "from engaging in any activity associated with rangeland conversion on the Borden Ranch, including deep ripping and discing, which results in the discharge from a point source of fill or dredged material into jurisdictional waters of the United States unless he has first obtained a permit under

the Clean Water Act authorizing such discharge." [Proposed] Final Judgment, ¶ 12. This proposal for a permanent injunction is rejected because the factors which the Court must consider in deciding whether to grant a permanent injunction do not favor the issuance of such an injunction. *See* Fed. R. Civ. P. 65(d); *United States v. Laerdal Manuf. Corp.*, 73 F.2d 852, 854-55 (9th Cir. 1995) (setting out factors); *Federal Election Comm'n v. Furgatch*, 869 F.2d 1256, 1262-64 (9th Cir. 1989) (same).

"[A] federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) (citing *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 193 (1978)). Further, an injunction is not the only means of ensuring compliance with the Clean Water Act. *Id.* at 314-15 (noting the availability of fines and criminal penalties). "Under [33 U.S.C.] § 1365(a), the district court has discretion to determine which form of relief is best suited, in the particular case, to abate current violations [of the Clean Water Act] and deter future ones." *Friends of Earth, Inc. v. Laidlaw Envtl. Services*, ___ U.S. ___, 120 S. Ct. 693, 699 (2000). An award of civil penalties premised in part upon the need for deterrence coupled with appropriate restoration may satisfactorily deter the risk of future violations. *See id.* ("[A] district court in a Clean Water Act citizen suit properly may conclude that an injunction would be an excessively intrusive remedy, because it could entail continuing superintendence of the permit holder's activities by a federal court – a process burdensome to court and permit holder alike."); *Nat'l Resources Defense Council, Inc. v. EPA*, 966 F.2d 1292, 1300 (9th Cir. 1992) ("Injunctive relief may

be inappropriate where it requires constant supervision."). In the Findings of Fact and Conclusions of Law, it was found that a $1.5 million civil penalty, or the combination of a $500,000 penalty and complete restoration of the wetlands damaged by Tsakopoulos's operations, would serve to adequately remedy the government for his violations of the Clean Water Act. The restorative injunction obviates the need for imposition of an additional injunction since it fosters the important federal interests involved. Since there has been no showing that further active management by the Court is required to achieve those interests, the Court declines to impose an additional injunction. Therefore, a permanent injunction will not issue.[1]

Accordingly, as agreed in the stipulated [Proposed] Final Judgment:

Civil Penalty

1. Tsakopoulos shall pay a civil penalty of $500,000 pursuant to 33 U.S.C. § 1319(d) as a consequence of his violations of the Clean Water Act on the San Joaquin County portion of the Borden Ranch during the period 1995 to 1997. This payment shall be made to the United States Treasury.

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[1] Tsakopoulos's request that the Final Order should dissolve the preliminary injunction entered October 20, 1997, is unnecessary. That injunction expires by its own terms upon the "resolution of the parties' action" – *i.e.*, with the forthcoming entry of Judgment.

Mitigation

2. Tsakopoulos shall cooperate with the Environmental Protection Agency ("EPA") and the Corps of Engineers in arranging for the preparation and implementation of a restoration plan providing for the creation or restoration of at least four acres of wetlands or other waters of the United States in and near Goose Creek, Dry Creek, or other areas owned by Tsakopoulos. Wetlands which cannot be restored to their prior condition should be replaced.

3. The restoration plan shall identify the goals of the restoration project, designate the areas to be affected, specify the activities to be completed, establish a timeline for the work, establish criteria for determining when the mitigation has been successful, provide for regular on-site monitoring and reporting, identify contingency measures in the event the initial efforts are not successful, estimate the cost of the project, and address such other mitigation issues as EPA deems necessary. Fill removal, creation of buffers, installation of culverts, and revegetation are among the activities that may be included in the restoration plan. The restoration plan shall also specify the steps reasonably required to be taken by Tsakopoulos in connection with implementation of the mitigation project, including any obligations to obtain further permits or to impose deed restrictions with respect to the applicable land, access to the applicable land, protection of the water sources necessary for mitigation, and the provision of information pertinent to the plan.

4. The restoration plan shall be prepared and implemented by an environmental consulting firm selected by EPA and acting under direction from EPA.

5. Tsakopoulos shall upon request provide EPA, the Corps, the designated consulting firm, and their representatives access to his Borden Ranch or other properties for purposes relating to development and implementation of the restoration plan. Tsakopoulos shall also make good faith effort to secure access to portions of the Borden Ranch or other properties selected for the restoration work no longer owned by him if such access is requested by EPA, the Corps, or the environmental consultant, for purposes relating to development and implementation of the plan.

6. Tsakopoulos shall reimburse the designated environmental consultant on a timely basis (within 30 days after receipt of monthly statements) for the fees, expenses, and other costs, including any subcontractor costs, associated with preparation and implementation of the restoration plan.

7. Tsakopoulos shall be provided the opportunity to comment on the restoration plan (and any necessary supplements or amendments thereto) as it is being implemented. However, the requirements of the restoration plan, and the manner and timing of its implementation, shall be determined by EPA, based on the recommendations of the environmental consultant and the Corps.

8. The final restoration plan must be approved by EPA before implementation. Within 30 days after approving the restoration plan, EPA shall provide a copy to

Tsakopoulos. Any subsequent amendments or supplements to the restoration plan shall be necessary to the proper completion of the proposed restoration and shall be provided to Tsakopoulos within 30 days after they have been approved by EPA.

9. EPA, in consultation with the Corps and the selected environmental consultant, shall be provided the opportunity to observe on-site construction activities and monitor the implementation of the restoration plan. This shall include periodic on-site inspection of the restoration activities and their impact.

10. EPA, in consultation with the Corps and the selected environmental consultant, shall determine when the requirements of the restoration plan have been fulfilled. Within 30 days after making such a determination, EPA shall notify Tsakopoulos in writing that EPA believes his restoration obligations have been satisfied. The Court retains continuing jurisdiction to resolve any disputes in this area.

11. If Tsakopoulos fails to comply in full with the foregoing provisions requiring restoration, EPA may seek appropriate relief from this Court. Such relief may include completion of the restoration plan or re-imposition of all or part of the potential $1 million in civil penalties referred to in the Findings of Fact and Conclusions of Law dated November 8, 1999. The Court retains continuing jurisdiction to resolve disputes concerning compliance with this injunction at either party's request.

Final Dismissal of Tsakopoulos's Affirmative Claims

12. Pursuant to this Court's Order filed June 9, 1998, as amended August 3, 1998, final judgment shall be entered in favor of defendants United States Army Corps of Engineers and United States Environmental Protection Agency on the claims asserted against them in this action by Borden Ranch Partnership and Angelo K. Tsakopoulos, and such claims are hereby finally dismissed.

The Clerk is directed to enter a Judgment in accordance with this Final Order, pursuant to Federal Rule of Civil Procedure 58.

IT IS SO ORDERED.

DATED: March 2, 2000

/s/ Garland E. Burrell, Jr.
GARLAND E. BURRELL, JR.
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JUDGMENT IN A CIVIL CASE

BORDEN RANCH PARTNERSHIP

v. CASE NUMBER: CIV S-97-858 GEB JFM

UNITED STATES ARMY CORPS OR [sic] ENGINEERS

(Filed Mar. 3, 2000)

XX – **Decision by the Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER OF March 3, 2000.

Jack L. Wagner,
Clerk of the Court

ENTERED: March 3, 2000

by: /s/ K Carlos
K Carlos, Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ANGELO K. TSAKOPOULOS, Plaintiff, v. AMERICAN MANUFACTURERS MUTUAL INSURANCE COMPANY, et al., Defendants.	CIV. S-99-0853 GEB JFM
And Related Counterclaims.	ORDER* (Filed Aug. 9, 2000)

Plaintiff ("Tsakopoulos") moves for partial summary judgment against each Defendant and Defendants cross-move for summary judgment pursuant to Federal Rule of Civil Procedure 56. For the reasons that follow, Tsakopoulos's motions are granted in part and denied in part, the motion of Defendants American Manufacturers Mutual Insurance Company ("AMMIC") and Lumbermens Mutual Casualty Company ("LMCC") is granted in part and denied in part, and the motion of Defendant Reliance Insurance Company ("Reliance") is granted in part and denied in part.

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* This case was determined to be suitable for decision without oral argument. L.R. 78-230(h).

I.

BACKGROUND

Tsakopoulos claims breach of contract and breach of the implied covenant of good faith and fair dealing against AMMIC, LMCC, and Reliance arising out of their declining to defend Tsakopoulos in certain litigation with the United States Environmental Protection Agency ("EPA") or to indemnify him for a certain aspect of the March 3, 2000, judgment entered therein ("Judgment").[1] Tsakopoulos seeks compensatory damages, declaratory relief, attorney's fees and costs. AMMIC, LMCC, and Reliance counterclaim for declaratory relief.

The following material facts are not in dispute. In 1993, Tsakopoulos purchased a property ("Borden Ranch") comprising 8,348 acres at the border between Sacramento and San Joaquin counties. Between late 1993 through late 1997, Tsakopoulos caused various portions of Borden Ranch to be plowed by his agents and/or employees primarily to convert the land for use as vineyards. In May of 1997, he and Borden Ranch Partnership ("Partnership"), of which he is the managing partner, commenced a federal civil action against the United States Army Corps of Engineers and the EPA seeking, *inter alia*, a judgment declaring that Tsakopoulos and the Partnership were not required to obtain permits pursuant to the Clean Water Act ("CWA"), 33 U.S.C. § 1344, to engage in certain plowing activities at Borden Ranch. As

[1] As discussed infra, Reliance actually funded Tsakopoulos's defense, but did so under a reservation of rights. Reliance seeks a judgment declaring that it was not obligated to defend Tsakopoulos.

part of its August 6, 1997, Answer, the EPA advanced a counterclaim ("Counterclaim") against Tsakopoulos alleging that, beginning sometime in November of 1994, he had violated the Clean Water Act during his plowing activities on certain portions of Borden Ranch by causing dredged or fill material to be discharged into waters of the United States. Specifically, the Counterclaim alleged that the soil discharged into jurisdictional waters as a result of Tsakopoulos's plowing constituted a "pollutant" within the meaning of the CWA.[2] Both sides thereafter filed motions for summary judgment concerning, *inter alia*, whether soil is a pollutant within the meaning of the CWA; the August 3, 1998, Amended Order held that any dredged or fill material discharged into waters of the United States resulting from plowing would constitute the discharge of a "pollutant" under the CWA.

On October 5, 1998, Tsakopoulos tendered the defense of the Counterclaim to Reliance, which had issued Tsakopoulos a comprehensive general liability ("CGL") insurance policy effective through July 15, 1997. By December 28, 1998, Tsakopoulos had received no decision from Reliance; on that date he tendered the defense of the Counterclaim to AMMIC and LMCC, which had issued him CGL insurance and excessive coverage policies which went into effect on July 16, 1997. In a letter dated March 18, 1999, AMMIC and LMCC rejected

[2] The CWA defines the term "pollutant" to mean "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6).

Tsakopoulos's tender on the ground that their policies exclude coverage for certain pollution damages and that the Counterclaim sought civil penalties and injunctive relief, which are not covered under the terms of their policies. But Reliance conditionally accepted his tender of defense on or about April 28, 1999, subject to a reservation of rights. Reliance has paid Tsakopoulos's costs defending the Counterclaim, including attorney's fees, incurred since the date of tender.[3]

A bench trial on the Counterclaim was held in August and September of 1999. Thereafter, Tsakopoulos was found to have caused 358 violations of the CWA during plowing activities on specified portions of Borden Ranch. *Borden Ranch Partnership v. United States Army Corps of Engineers*, CIV. S-97-0858 GEB JFM ("*Borden Ranch*"), Findings of Fact and Conclusions of Law filed November 8, 1999 ("Findings and Conclusions") at 34.[4] Tsakopoulos and/or his agents were found to have "utilized [certain plowing equipment] almost 24 hours per day with little or no supervision at night, and in a manner which seemed impervious to the substantial risk of ripping and depositing fill into federal wetlands. . . . Tsakopoulos apparently intended to avoid the necessity of obtaining a permit on [the subject parcels] by avoiding deep ripping jurisdictional waters therein. . . . [But he]

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[3] Through the time the Judgment was entered, the defense expenses which Reliance has paid total approximately $1.2 million.

[4] Judicial notice of the Findings and Conclusions is taken pursuant to the parties' requests and Federal Rule of Evidence 201.

expended little effort to comply with the [CWA] prior to the summer of 1996. . . . [For example,] there was no serious effort to avoid waters of the United States when deep rippers plowed nearly all of [a certain parcel prior to the summer of 1996]." *Id.* at 43-44. Further, "Tsakopoulos realized his obligation to ensure his agents avoided deep ripping federal wetlands but failed to devise a ripping operation sufficient to avoid those jurisdictional features. The plan developed created a plain and obvious risk that others would rip these features because it authorized ripping to occur almost continuously without enough supervision, and even in the wee hours of the morning and night." *Id.* at 46-47. Tsakopoulos was fined $1.5 million under CWA's civil penalty provision. 33 U.S.C. § 1319(d). However, the Findings and Conclusions further held that $1 million of this fine would be held in abeyance if Tsakopoulos would consent to the entry of injunctive relief requiring him to remedy the violations in cooperation with the government and in accordance with a restoration plan to be developed by an independent environmental consulting firm. *Id.* at 47-49. Tsakopoulos, elected to undertake the restoration. Therefore, the subsequent Judgment incorporated a restorative injunction which required him to cooperate and arrange for the preparation and implementation by an environmental consultant of a restoration plan involving the creation or remediation of at least four acres of wetlands or other waters of the United States. Final Order filed March 3, 2000, at 4.[5] Tsakopoulos is required to reimburse the environmental consultant for

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[5] Tsakopoulos has appealed from the Judgment.

its costs and expenses in preparing and implementing the plan. *Id.* at 5.

II.

DUTY TO DEFEND

The parties agree that California law governs the subject insurance policies. Under California law, "a liability insurer owes a broad duty to defend its insured against claims that create a potential for indemnity. . . . [T]he carrier must defend a suit which potentially seeks damages within the coverage of the policy. . . . Implicit in this rule is the principle that the duty to defend is broader than the duty to indemnify. . . . " *Standun, Inc. v. Fireman's Fund Ins. Co.*, 62 Cal. App. 4th 882, 888 (1998) (internal quotation marks and citations omitted). "[T]he duty to defend should be fixed by the facts which the insurer learns from the language of the insurance policy and the allegations in the complaint], the insured, or other sources. An insurer, therefore, bears a duty to defend its insured whenever it ascertains facts which give rise to the potential of liability under the policy." *Gray v. Zurich Ins. Co.*, 65 Cal. 2d 263, 276-77 (1966). "To prevail . . . on the issue of duty to defend, the insured must prove the existence of a-potential for coverage, while the insurer must establish the absence of any such potential. 'In other words, the insured need only show that the underlying claim *may* fall within policy coverage; the insurer must prove it *cannot*.' " *Standun*, 62 Cal. App. 4th at 888-89 (quoting *Montrose Chemical Corp. of California v. Superior Court (Canadian Universal Ins. Co.)*, 6 Cal. 4th 287, 300 (1993)).

Tsakopoulos seeks a declaration that each Defendant was and is obligated to defend him on the Counterclaim and summary adjudication on the issue of AMMIC's and LMCC's liability for breach of contract. Defendants argue that they had no duty to defend Tsakopoulos on the Counterclaim because (i) the alleged discharges did not constitute an "occurrence" within the meaning of the policies, (ii) the Counterclaim did not seek "damages" within the meaning of the policies, and (iii) the Counterclaim arose out of damage caused by "pollutants" within the meaning of the "total pollution exclusions" in the policies. LMCC contends it had no duty to defend Tsakopoulos because his primary insurance coverage had not been exhausted. These contentions are addressed *seriatim*.[6]

A.

"Occurrence" / Expected or Intended Damages

Each of the insurance policies at issue sets forth that it only covers damages arising out of an "occurrence," which is defined as an "accident"; damages which are "intended" or "expected" by the insured are excluded from coverage.[7] Defendants submit no evidence demonstrating that Tsakopoulos subjectively "expected or

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[6] Since both sides have filed cross motions for summary adjudication as to Tsakopoulos's duty-to-defend claim, and certain other issues in this lawsuit, the ordinary implication is, and the parties agree, that no disputed issues of material fact exist as to these issues and that the disputes over these issues may be decided a matter of law. *See A & A Concrete, Inc. v. White Mountain Apache Tribe*, 781 F.2d 1411, 1417 n.1 (9th Cir. 1986).

[7] In each of the subject policies, "occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same general hazardous conditions." Each

intended" the discharges. *Shell Oil Co. v. Winterthur Swiss Ins. Co.*, 12 Cal. App. 4th 715, 746-47 (1993) (holding that the term "expected" means that the insured subjectively knew or believed an event would occur); *Meyer v. Pacific Employers Ins. Co.*, 233 Cal. App. 2d 321, 326 (1965) ("We approach the question as to whether damage to plaintiffs' property was accidental from the standpoint as to whether it was unexpected by the insured."). To show that Tsakopoulos "expected" the plowing activities would cause discharge into jurisdictional waters, Defendants must show that he " 'knew or believed [his conduct] was substantially certain or highly likely to result' in harm to the [government]." *Smith v. Hughes Aircraft Co.*, 22 F.3d 1432, 1439 (9th Cir. 1994) (quoting *Shell Oil Co.*, 12 Cal. App. 4th at 748). Defendants have failed to adduce evidence sufficient to meet this standard. Rather, they contend that they had no duty to defend the Counterclaim because "[t]here was nothing 'accidental' about the property damage that the EPA alleged in its counterclaim. . . . The claims for which [Tsakopoulos] seeks coverage did not arise from any 'accidental' property damage. Rather, the underlying claims arose from [his] pursuit of development activities without obtaining the necessary permits." Reliance's Memorandum of Points and Authorities filed June 1, 2000, at 19-20; *see also* AMMIC's & LMCC's Reply filed June 23, 2000, at 13 ("[A]ny alleged 'property

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policy also excludes coverage of liability for " 'bodily injury' or 'property damage' expected or intended from the standpoint of the insured." Under California law, "[e]xpected and intended injuries or damage are not accidents," so analyses of these provisions necessarily overlap. *Collin v. American Empire Ins. Co.*, 21 Cal. App. 4th 787, 805 (1994).

damage' is not the result of an accident, but rather, is the result of a deliberate effort to 'deep plow' Borden Ranch to prepare it for cultivation of deep root crops."). But under California law "coverage is not always precluded merely because the insured acted intentionally and the victim was injured. . . . [A]n 'accident' exists when any aspect of the causal series of events leading to the injury or damage was unintended by the insured and a matter of fortuity." *Merced Mutual Ins. Co. v. Mendez*, 213 Cal. App. 3d 41, 50 (1989).[8] The fact that Tsakopoulos intended that Borden Ranch be plowed generally does not mean that he intended to discharge soil into jurisdictional waters. Further, the Counterclaim did not allege that Tsakopoulos acted intentionally to discharge fill or dredged material into jurisdictional waters; the CWA imposes liability for unpermitted discharges on a strict-liability basis. 33 U.S.C. § 1311(a); *United States v. Pozsgai*, 999 F.2d 719, 725 (3d Cir. 1993); *United States v. Winchester Municipal Utilities*, 944 F.2d 301, 304 (6th Cir. 1991). Even assuming that, at the time they declined coverage, Defendants were aware of all the facts eventually proven at trial,[9] these facts would not establish that Tsakopoulos

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[8] "The following is illustrative. When a driver intentionally speeds and, as a result, negligently hits another car, the speeding would be an intentional act. However, the act directly responsible for the injury – hitting the car – was not intended by the driver and was fortuitous. Accordingly, the occurrence resulting in injury would be deemed an accident." *Merced Mutual Ins.*, 213 Cal. App. 3d at 50.

[9] Defendants' arguments fail to specify upon what information they based their decisions whether to defend on the Counterclaim. "In determining whether a duty to defend exists, courts look to all the facts available to the insurer at the time the

intentionally caused fill or dredged material to be discharged into jurisdictional waters. As Defendants concede, Tsakopoulos was found to have made efforts, albeit unsuccessfully, to avoid jurisdictional waters so that he could avoid the necessity of obtaining a permit from the government. Therefore, Defendants have not shown that the CWA violations claimed in the Counterclaim and demonstrated by the evidence were not an occurrence, or occurrences, within the coverage of the policies.

B.

"Damages"

Defendants next contend that the restoration costs sought by the government in the Counterclaim were not damages within the meaning of the subject policies because, at common law, an injunction is an equitable remedy, while "damages" in an insurance policy typically refers only to legal relief. The term "damages" is not defined in the policies. Under California law, at least some "costs incurred to comply with an injunction mandating [environmental] cleanup or to reimburse a government agency for cleanup expenses the agency has incurred are 'damages' within the meaning of the [standard CGL] insurance policy." *Intel Corp. v. Hartford Accident & Indem. Co.*, 952 F.2d 1551, 1563 (9th Cir. 1991)

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insured tenders [his] claim for the defense." *Reese v. Travelers Ins. Co.*, 129 F.3d 1056, 1060 (9th Cir. 1997). Since the evidence adduced at trial does not establish that Tsakopoulos's violations of the CWA were intentional, Defendants' failure to adduce any other evidence of Tsakopoulos's knowledge or intent is dispositive.

(citing *AIU Ins. Co. v. Superior Court (FMC Corp.)*, 51 Cal. 3d 807 (1990) ("*AIU*")). Here, the Counterclaim sought, in pertinent part, an Order "requir[ing] Tsakopoulos to prepare and implement a plan for the removal of discharged pollutants and restoration of waters of the United States on the portions of Borden Ranch in San Joaquin County, and to mitigate for the damage caused to the effected areas by the unlawful discharges of dredged or fill material." Tsakopoulos seeks indemnification only for the cost of the restorative aspect of the injunction, which requires him to reimburse the expenses of an independent environmental consultant designated by the government. Defendants argue that *Intel Corp.* and *AIU* are distinguishable because these cases dealt with injunctions issued under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). As the California Supreme Court noted in *AIU*, CERCLA authorizes an enforcing agency to seek and recover either injunctive restorative relief requiring a liable person to cleanup pollution or "reimbursement" for cleanup costs incurred by the government. *See* 51 Cal. 3d at 828, 837-38. It was reasoned that, since awards of reimbursement were "damages" within the meaning of CGL insurance policies, "it would exalt form over substance to interpret CGL policies to cover one remedy over the other." *Id.* at 840. Defendants point out that, under the CWA, the government may seek only civil penalties or injunctive relief. They assert that civil penalties under the CWA, for which Tsakopoulos does not seek reimbursement, are not "damages," and thus there is no reason to deem the costs of complying with injunctive relief imposed under the CWA

to be "damages" under the CGL insurance policies.[10] This argument is unpersuasive. As the Ninth Circuit noted in *Intel Corp.*, the California Supreme Court "rejected the argument that the distinctions or definitions contained in CERCLA with regard to the types of available relief were relevant to its determination: at issue was the interpretation of the insurance policy under state law." 952 F.2d at 1563. The California Supreme Court's holding that injunctions requiring environmental cleanup are "damages" under state law turned on the "purposes addressed" through the imposition of the injunctive releif. *AIU*, 51 Cal. 3d at 838; *see also id.* at 841 ("Under CERCLA and similar statutes, injunctive relief and reimbursement of response costs serve substantially the same purpose."). Therefore, predicting California law, the phrase "damages" in the relevant policies emcompasses injunctive restorative relief imposed under the CWA.

There is an additional consideration which neither side addresses and which supports this conclusion. The portion of the "pollution exclusion" in each policy which specifically excludes any "loss, cost or expense arising out of any . . . order that any insured or others test for,

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[10] Although neither side notes this fact, *AIU* involved injunctive relief imposed not only under CERCLA, but also under the CWA and other environmental statutes. 51 Cal. 3d at 815, 816. Further, the California Supreme Court's holding therein was that "the costs of injunctive relief under *the statutes in question here* are 'damages' for CGL purposes." *Id.* at 841-42 (emphasis added). It is unclear whether this language refers in part to the CWA. In any event, given the reasoning employed by the California Supreme Court, the injunctive remedy imposed upon Tsakopoulos constituted "damages" within the meaning of the relevant CGL insurance policies under California law.

monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of pollutants" would be rendered largely superfluous if such "loss[es], cost[s], or expense[s]" were not "damages" otherwise covered under the policy. An insurance policy provision should not be construed so that another policy provision is rendered mere surplusage. CAL. CIV. CODE § 1641; *Berg v. MTC Elec. Tech. Co.*, 61 Cal. App. 4th 349, 361-62 (1998); *Farmers Ins. Exchange v. Knopp*, 50 Cal. App. 4th 1415, 1421 (1996).

C.

Pollution Exclusions

Defendants next argue that liability for the damages Tsakopoulos caused to waters of the United States is excluded from coverage under the "total pollution exclusion" in each policy. However, this exclusion applies only to damages caused by "pollutants," a term which is defined in each policy as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." Defendants argue that the term "pollutants" unambiguously includes soil displaced by Tsakopoulos's plowing operations. Tsakopoulos counters that, in this context, the term pollutants is at least ambiguous and, therefore, should be construed against Defendants.[11]

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[11] Because the definition of "pollutants" is ambiguous in this context, Tsakopoulos's alternative contention that the pollution exclusion should be construed as applying only to "man-made" materials is not reached.

Under California law, "[a]n insurer may select the risks it will insure and those it will not, and a clear exclusion will be respected. . . . Where the exclusion is clear, [the court] will not rewrite the insurance contract to impose coverage where none was contemplated. . . . However, an exclusion or limitation on coverage must be clearly stated and will be strictly construed against the insurer." *Smith Kandal Real Estate v. Continental Cas. Co.*, 67 Cal. App. 4th 406, 414 (1998) (citations omitted); *see also Manneck v. Lawyers Title Ins. Corp.*, 28 Cal. App. 4th 1294, 1302 (1994) ("[I]nsurance contract provisions relating to exclusions or exceptions from the performance of the basic, underlying obligations are construed strictly against the insurer and liberally in favor of the insured. . . . "). A term in an insurance policy is deemed ambiguous if "it is capable of two or more constructions, both of which are reasonable." *Fireman's Fund Ins. Co. v. Superior Court (Vickers Inc.)*, 65 Cal. App. 4th 1205, 1212 (1997), *review dismissed* 79 Cal. Rptr. 2d 72 (1998) ("*Fireman's Fund*"). "Of course, as is true of any contract, [the court] must interpret the policy as a whole, not in the abstract, and [the court] will not strain to create an ambiguity where none exists or indulge in tortured constructions to divine some theoretical ambiguity in order to find coverage where none was contemplated." *Id.* at 1212-13 (citations omitted); *see also Manneck*, 28 Cal. App. 4th at 1302.

As noted, a substance must be a "contaminant" or an "irritant" to be a "pollutant" within the meaning of the policies. Webster's Third New International Dictionary (1986) ("Webster's") defines a contaminant as "something that contaminates"; to "contaminate" means "to soil,

stain, corrupt, or infect by contact or association" or "make inferior or impure by mixture," or "to render unfit for use by introduction of unwholesome or undesirable elements." Webster's at 491.[12] An "irritant" is "something that irritates or excites," and to "irritate" means "to increase the action of" or "heighten excitement in" something. *Id.* at 1197. Soil discharged into previously-unspoiled waters of the United States might constitute a "contaminant" or an "irritant" if those terms were to be construed liberally. However, the definition of "pollutants" in each policy sets forth specific examples of contaminants and/or irritants: "smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." According to the principle of *ejusdem generis*, the proper construction of the term "pollutant" is therefore "restricted" to contaminants and irritants which are "of the same kind, class, or nature" as the specific examples listed. *Harris v. Capital Growth Investors XIV*, 52 Cal. 3d 1142, 1159 (1991); *see also Mez Indus., Inc. v. Pacific Nat'l Ins. Co.*, 76 Cal. App. 4th 856, 873 (1999) ("Our construction of [a phrase in an insurance policy] is informed by the doctrine of *ejusdem generis* under which a term is interpreted by reference to the surrounding language.").[13] Defendants argue that the

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[12] "The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning." CAL. CIV. CODE § 1644; *see also Stanford Ranch, Inc. v. Maryland Cas. Co.*, 89 F.3d 618, 626 (9th Cir. 1996). Resort to a dictionary is often appropriate to find a word's ordinary and popular meaning. *See Scott v. Continental Ins. Co.*, 44 Cal. App. 4th 24, 29-32 (1999) (citing, among other sources, Webster's).

[13] Although *Harris* involved the construction of a general term which followed a list of specific terms, *"[e]jusdem generis*

use of the word "including" before the specific examples means that the definition of "pollutants" should not be limited to substances which are similar to specified examples. However, the use of the word "including" does not affect the application of the *ejusdem generis* doctrine. *County of Yolo v. Los Rios Community College Dist.*, 5 Cl. App. 4th 1242, 1254 (1992) (holding that the term "include, but need does not be limited to" does not preclude the application of the *ejusdem generis* principle).

Defendants next contend that certain California courts have held that the absolute pollution exclusion is unambiguous. *See, e.g., Titan Corp. v. Aetna Cas. & Surety Co.*, 22 Cal. App. 4th 457, 469-70 (1994) ("We are unaware of any California cases holding that a similarly worded exclusion was ambiguous as to its coverage.") (finding that trichloroethylene (TCE) is a "pollutant").[14] But insurance policy provisions "can, of course, be ambiguous in one context and not another." *Continental Cas. Co. v. Rapid-American Corp.*, 80 N.Y.2d 640, 652 (1993) (noting that the pollution exclusion has been held to be unambiguous in covering discharges of "acids, alkalis and toxic chemicals," but ambiguous as to discharges of "natural

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applies whether specific words follow general words . . . or vice versa. In either event, the general term or category is 'restricted to those things which are enumerated specifically.' " *Harris*, 52 Cal. 3d at 1160 n.7 (quoting *Martin v. Holiday Inns, Inc.*, 199 Cal. App. 3d 1434, 1437 (1988)).

[14] Notably, however, *Titan Corp.* found that "[t]he relevant policy language [comprising the pollution exclusion] *may be ambiguous* on whether [discarded] scrap ferrite, brick, rubble, [or] wood debris [would] fall within the exclusionary language." 22 Cal. App. 4th at 470 (emphasis added).

materials") (citing *Hicks v. American Resources Ins. Co.*, 544 So. 2d 952, 953 (Ala. 1989), and *Molton, Allen & Williams v. St. Paul Fire & Marine Ins. Co.*, 347 So. 2d 95, 99 (Ala. 1977) ("*Molton*")); *accord Sterling Builders, Inc. v. United Nat'l Ins. Co.*, 79. Cal. App. 4th 105, 112 (2000) ("Contract terms are not ambiguous in a vacuum; they must be examined in context."); *see also Titan Corp.*, 22 Cal. App. 4th at 470. *Molton* is persuasive that the pollution exclusions at issue are ambiguous in this context.[15] In *Molton*, the insured was a developer who was constructing roads in a new development situated uphill from neighboring parcels. 347 So. 2d at 96. After the roadways were cleared and cut, but before they were paved, rainfall washed over the roadways and carried "sandstone and sandstone-type materials found naturally in the earth," which the rainwater had broken down into sand, onto the neighboring parcels, damaging them. *Id.* at 96-97. The Court rejected the insurer's argument that a pollution exclusion substantially similar to the ones in this case eliminated coverage for the damage to the neighboring parcels, stating:

> [W]hile a liberal construction of the 'pollution exclusion' would include the damage allegedly

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[15] Defendants AMMIC and LMCC contend that *Molton* is inapposite because that case "involved a pollution exclusion which, unlike the AMMIC policy, failed to define 'pollutants' at all." AMMIC's & LMCC's Memorandum of Points and Authorities filed June 15, 2000, at 14 n.3. This argument is misleading since the pollution exclusion in *Molton* was nearly identical to the exclusions in this case: it excluded coverage for "bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials, or other irritants, contaminants or pollutants. . . . " 347 So. 2d at 97.

> caused by [the insured], the clause is not free from ambiguity. It is believed that the intent of the 'pollution exclusion' clause was to eliminate coverage for damages arising out of pollution or contamination by industry-related activities. *The use of specific industry-related irritants, contaminants and pollutants seem to indicate this was the reason for the exclusion. . . . [T]he clause here is ambiguous.*

Id. at 99 (emphasis added).

Defendants argue that California courts have rejected the notion that the pollution exclusion is limited to hazardous or toxic materials and suggest that *Molton* found an ambiguity based upon a finding that the sand in that case was not hazardous. However, this misreads the holding of *Molton*, which found that pollution exclusion was ambiguous in the context of sand, given the specific examples of "irritants, contaminants or pollutants" listed in the policy. 347 So. 2d at 97.

In contrast to *Molton*, Defendants cite *Pennsylvania Nat'l Mut. Cas. Ins. Co. v. Triangle Paving, Inc.*, 973 F. Supp. 560 (E.D.N.C. 1996), *aff'd*, 121 F.3d 699 (4th Cir. 1997) (Table) (*"Triangle Paving"*), which held that "sediment dislodged by the [insured's] construction activity [which] escaped the construction site and contaminated downstream water located on private property" constituted a "pollutant" within the meaning of a substantially similar pollution exclusion in a CGL insurance policy. 973 F. Supp. at 562. However, Defendants have not shown that *Triangle Paving* is persuasive guidance for interpreting the exclusion clauses in this case. First, the district

court in that case rejected the argument that "the enumerated list in the definition serves to limit pollutants to the specified examples," and held that, "[i]n context, the term 'including' clearly signifies that the ensuing list [of specified pollutants] is not one of limitation." *Id.* at 563. But under California law, the doctrine of *ejusdem generis* calls for a contrary analysis of the policies in this case. *Harris*, 52 Cal. 3d at 1159-60; *Los Rios Community College Dist.*, 5 Cal. App. 4th at 1254. The district court in *Triangle Paving* also noted that North Carolina's Sedimentation Pollution Control Act expressed the State legislature's finding that "[t]he sedimentation of streams, lakes and other waters of this State constitutes a major pollution problem." 973 F. Supp. at 564 (quoting N.C. GEN. STAT. § 113A-51). Accordingly, the district court concluded that "the statutory scheme offers uncontroverted evidence of how sedimentation is perceived and treated in the very profession in which defendant is engaged." *Id.* at 565. Defendants point out that, similarly, the definition of "pollutants" under the CWA includes soil discharged during plowing. However, under California law, the determination whether a clause is ambiguous depends upon whether a clause is subject to two or more reasonable interpretations; a court must look to the provision's "plain meaning or the meaning a layperson would ordinarily attach to it." *Fireman's Fund*, 65 Cal. App. 4th at 1212-13; *see also Culligan v. State Compensation Ins. Fund*, 81 Cal. App. 4th 429, 434 (1999).

Since the definition of "pollutants" contained in each of the relevant policies is reasonably construed either to include soil discharged into waters of the United States or

to exclude such material, that term is ambiguous under the circumstances of this case. Neither construction would be "tortuous," *Fireman's Fund*, 65 Cal. App. 4th at 1212; "strange," *Culligan*, 81 Cal. App. 4th at 435; or "absurd," *id.*; each would be reasonable. While soil could arguably be an "irritant" or a "contaminant" when discharged into previously-unspoiled waters, the list of specified examples of pollutants which follows these terms restricts their construction. Since soil is not apparently of "the same kind, class, or nature," *Harris*, 52 Cal. 3d at 1159, as "smoke, vapor, soot, fumes, acids, alkalis, chemicals [or] waste," the definition of pollutant does not unambiguously cover soil.

Under California law, an ambiguity in an insurance policy "is resolved by interpreting the ambiguous provisions in the sense the promisor (i.e., the insurer) believed the promisee understood them at the time of formation." *Montrose Chem. Corp. of California v. Admiral Ins. Co.*, 10 Cal. 4th 645, 667 (1995) (quoting *AIU*, 51 Cal. 3d at 822); *see also* CAL. CIV. CODE § 1649. "This rule, as applied to a promise of coverage in an insurance policy protects not the subjective beliefs of the insurer but, rather, the objectively reasonable beliefs of the insured." *Id.* (quoting *Bank of the West v. Superior Court (Indus. Indem. Co.)*, 2 Cal. 4th 1254, 1265 (1992)) (internal quotation marks and citation omitted) "Only if this rule does not resolve the ambiguity [does the court] then resolve it against the insurer." *Id.* (quoting *Bank of the West*, 2 Cal. 4th at 1265); *see also AIU*, 51 Cal. 3d at 822; CAL. CIV. CODE § 1654.

Defendants contend that Tsakopoulos could not reasonably have expected the relevant policies to cover soil

discharged into waters of the United States because of his familiarity with the CWA and his repeated interactions with government agencies which enforce the CWA and which consistently had asserted that the CWA required that Tsakopoulos obtain a permit for soil discharges which might occur during his plowing activities. Tsakopoulos counters that the definition of "pollutant" set forth in the CWA should have no impact on the construction of the term "pollutant" contained in the relevant CGL insurance policies, citing *Legarra v. Federated Mut. Ins. Co.*, 35 Cal. App. 4th 1472 (1995). In *Legarra*, the insureds contended that petroleum was not a pollutant under their CGL insurance policy's pollution exclusion based upon a statutory exclusion for petroleum under a particular California hazardous-substances law. *Id.* at 1481. The court rejected this argument because the insurance policy defined the term "pollutant" differently than the cited statutes, and petroleum is widely held to be a "contaminant" or "irritant." *Id.* Similar reasoning applies here. Defendants have not shown how the CWA's definition of "pollutant" has any relevance to the reasonableness of Tsakopoulos's expectation of coverage under the policies. Although Defendants argue that Tsakopoulos's knowledge of the government's interpretation of the CWA is relevant to the objective reasonableness of his construction of the insurance policies, that argument fails to adequately consider how Tsakopoulos could have reasonably interpreted the disputed definition of, "pollutants" in this context, and the intended function of the pollution exclusion in the policies. Defendants have not shown that Tsakopoulos's expectation of coverage under the CGL insurance policies was objectively unreasonable.

Since coverage for the unpermitted discharges of soil "is consistent with the insured's objectively reasonable expectations" of coverage, the ambiguity of the definition of "pollutants" in this context must be resolved against Defendants. *Bank of the West*, 2 Cal. 4th at 1265; *see also* CAL. CIV. CODE § 1654.

D.

LMCC's Duty as Excess Insurance Provider

LMCC argues that, in any event, it owed no duty to defend Tsakopoulos on the Counterclaim until "the AMMIC policy and the Reliance policy issued to Tsakopoulos have been exhausted through judgments or settlements." AMMIC's & LMCC's Memorandum of Points and Authorities filed June 1, 2000, at 18. Tsakopoulos does not respond to this contention. "Unless the provisions of an excess policy provide otherwise, an excess insurer has no obligation to provide a defense to its insured before the primary coverage is exhausted." *Community Redevelopment Agency v. Aetna Cas. & Sur. Co.*, 50 Cal. App. 4th 329, 338 (1996) (citing *Hartford Accident & Indemnity Co. v. Superior Court (Syntex Corp.)*, 23 Cal. App. 4th 1774, 1779-80 (1994)). Since Tsakopoulos has not shown that his primary insurance coverage has been exhausted, LMCC does not owe a duty to defend the Counterclaim.

E.

Conclusion

Since Tsakopoulos has shown there existed "a potential for coverage" for "damages" sought by the Counterclaim, and Defendants AMMIC and Reliance have failed to demonstrate "the absence of any such potential," these Defendants owe Tsakopoulos a duty to defend him on the Counterclaim. *Standun*, 62 Cal. App. 4th at 888-89. Further, by failing to defend Tsakopoulos after he tendered the defense of the Counterclaim, AMMIC breached the insurance policy it issued to him. Tsakopoulos is entitled to a declaratory judgment that AMMIC and Reliance were obligated to defend him on the Counterclaim after the defense had been tendered to the respective insurer, and to summary adjudication of his breach-of-contract claim against AMMIC. Since Tsakopoulos has not shown that his primary insurance has been exhausted, LMCC is entitled to summary judgment on Tsakopoulps's duty-to-defend claims. Tsakopoulos has not shown that Reliance breached the duty to defend arising from its insurance policy, because it provided funding for the defense under a reservation of rights. Therefore, the aspect of Reliance's motion which seeks summary judgment on Tsakopoulos's breach-of-contract claim against it will be granted.[16]

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[16] In his papers, Tsakopoulos indicates that he would dismiss his claims for breach of contract and breach of the implied covenant of good faith and fair dealing against Reliance following resolution of these motions. Tsakopoulos's Memorandum of Points and Authorities filed May 31, 2000, at 6 n.1. Since Reliance seeks summary judgment on these claims in its motion, the claims are resolved herein.

III.

DUTY TO INDEMNIFY

Reliance agreed to indemnify Tsakopoulos for any damages he became legally obligated to pay arising out of covered occurrences through July 15, 1997. AMMIC agreed to indemnify him for occurrences on or after July 16, 1997. LMCC provides excess insurance coverage for occurrences on or after July 16, 1997. Tsakopoulos seeks a declaratory judgment that all Defendants are obligated to indemnify him for the restorative injunction aspect of the Judgment entered in *Borden Ranch*.

A.

AMMIC's Liability

"The general rule is long-settled in California that 'an insurer that wrongfully refuses to defend is liable on the judgment against the insured.' " *Pershing Park Villas Homeowners Assoc. v. United Pacific Ins. Co.*, ___ F.3d ___, 2000 WL 914153, at *5 (9th Cir. July 10, 2000) (quoting *Gray*, 65 Cal. 2d at 279). Since AMMIC breached its duty to defend Tsakopoulos on the Counterclaim, Tsakopoulos contends AMMIC is automatically obligated to indemnify him for the costs of the restorative injunction. AMMIC does not respond to this contention. However, it argues in a footnote that "Tsakopoulos acknowledges that the [Findings and Conclusions] 'ultimately found no violations by TSAKOPOULOS occurred after January, 1997.' While this may not impact AMMIC's duty to defend, it certainly impacts its duty to indemnify since [its] policy did not become effective until approximately seven (7) months *after* the last violation of the Clean Water Act.

Even if the Court determiens that coverage exists for violations of the Clean Water Act, AMMIC cannot have any indemnity obligations for violations of the Clean Water Act, none of which take place during its policy period." AMMIC's & LMCC's Memorandum of Points and Authorities filed June 15, 2000, at 22-23 n.5 (emphasis in original). Tsakopoulos does not dispute that no CWA violations after January of 1997 are at issue. Tsakopoulos's Memorandum of Points and Authorities filed May 31, 2000, at 18 n.3; Tsakopoulos's Memorandum of Points and Authorities filed June 14, 2000, at 28; Tsakopoulos's Reply Memorandum filed June 23, 2000, at 10.[17]

Since AMMIC wrongfully refused to defend Tsakopoulos on the Counterclaim, it is liable for "the amount which will compensate [Tsakopoulos] for all the detriment proximately caused [by its breach], or which, in the ordinary course of things, would be likely to result therefrom." *Amato v. Mercury Cas. Co.*, 53 Cal. App. 4th 825, 831 (1997) (quoting CAL. CIV. CODE § 3300). Where, as here, an insured is able to mount a defense notwithstanding "the insurer's refusal to defend, the usual contract damages are the cost of the defense." *Id.* However, where the insurer tortiously refuses to defend – i.e., breaches the

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[17] In the Findings and Conclusions, the undersigned district judge found that the EPA had not sustained the burden of demonstrating that any of the CWA violations occurred subsequent to January 30, 1997, the date after which the civil penalty for violations of the CWA increased by ten percent. Findings and Conclusions at 34. However, it was noted that there was evidence which suggested there might have been CWA violations as late as April of 1997. *Id.*

implied covenant of good faith and fair dealing – it is generally obligated to indemnify the insured for the subsequent judgment "and cannot rely on hindsight that a subsequent lawsuit establishes noncoverage." *Id.* at 833; *see also Pershing Park Villas Homeowners Assoc.*, 2000 WL 914153, at *5. Here, Tsakopoulos has not yet shown that AMMIC tortiously refused to provide for a defense on the counterclaim. Therefore, he is not entitled to a declaration that AMMIC is obligated to indemnify him for any part of the Judgment. However, AMMIC is not entitled to summary adjudication on this issue either because, as discussed *infra*, it has failed to demonstrate that it did not act in bad faith in refusing Tsakopoulos's tender of the defense.

B.

LMCC's Liability

Since Tsakopoulos does not dispute that there were no CWA violations found after January of 1997, and LMCC did not breach any duty to defend him on the Counterclaim, Tsakopoulos has not shown that LMCC is liable to indemnify him for any part of the Judgment.

C.

"Occurrence"

Defendants argue in opposition to Tsakopoulos's claims for indemnification that the Findings and Conclusions imposed liability for CWA violations which do not constitute an "occurrence" within the coverage of the policies. But as discussed supra, Defendants have not shown that the discharges of soil which led to

Tsakopoulos's liability under the CWA were expected or intended. Although the Findings and Conclusions evince that Tsakopoulos acted in gross dereliction of his duties under the CWA, Defendants point to no evidence that he acted with the requisite knowledge or intent such as would deprive him of coverage under the CGL insurance policies. The restorative injunction was not based upon any finding that Tsakopoulos acted intentionally or knowingly in discharging soil into jurisdictional waters. Therefore, Tsakopoulos has shown that the discharges constituted an occurrence or occurrences within the coverage of the policies.

D.

"Damages"

Defendants contend that the restorative injunction entered in *Borden Ranch* was imposed in lieu of $1 million in civil penalties and thus the injunction should be deemed punitive in nature, and not "damages" within the coverage of the policies. However, Tsakopoulos's consent to entry of the restorative injunction reflects his agreement to restore damaged wetlands, or replace any which cannot be restored. "In both instances, the amount 'restored' relates to actual harm caused by [Tsakopoulos's] prior actions." *United States v. Telluride Co.*, 146 F.3d 1241, 1248 (10th Cir. 1998).[18] Tsakopoulos's

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[18] Although Defendants did not argue that the injunction is punitive because the acreage involved in the restoration exceeds the actual amount found damaged in *Borden Ranch*, this argument would have been unavailing. The excess acreage resulted from the government's position that, because

decision to opt for a restorative injunction in lieu of a monetary civil penalty does not change the remedial nature of the restorative injunction. A consensual restorative injunction may constitute "damages" within the meaning of the CGL insurance policies. *Intel Corp.*, 952 F.2d at 1563-64 (concluding that "the California Supreme Court would extend [the holding in *AIU*] and find that costs incurred to comply with a consent decree are 'damages' "). Thus Defendants have not shown that the restorative injunction imposed did not constitute damages which Tsakopoulos was obligated to pay and for which he is be [sic] entitled to indemnification under the relevant policies.

E.

Conclusion

Since Tsakopoulos has shown that the cost of the restorative injunction imposed as part of the Judgment constitutes damages which he is legally obligated to pay within the meaning of the subject policies, Defendant Reliance is obligated to indemnify him for such costs. Since he has not yet shown that AMMIC acted in bad faith in denying his tender of the defense of the Counterclaim, he is not entitled to a declaration that AMMIC is

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Tsakopoulos's plowing activities caused indirect harm to "areas of Goose Creek and other waters on the San Joaquin [County] side of Borden Ranch [not directly impacted by the plowing activities], e.g., through sedimentation and increased water flow[,] compensatory restoration should be at a 2-to-1 ratio." *Borden Ranch*, Trial Brief of the United States filed August 10, 1999, at 39.

liable for indemnification of such costs. LMCC is entitled to summary judgment on Tsakopoulos's indemnification claims.

IV.

TSAKOPOULOS'S BAD-FAITH CLAIMS

Defendants seek summary judgment on Tsakopoulos's claims for breach of the implied covenant of good faith and fair dealing, arguing solely that they may not be held liable for breaching the covenant because they did not breach any contractual duty to Tsakopoulos. "[T]here are at least two separate requirements to establish breach of the implied covenant: (1) benefits due under the policy must have been withheld; and (2) the reason for withholding benefits must have been unreasonable." *Love v. Fire Ins. Exchange*, 221 Cal. App. 3d 1136, 1151 (1990). Since AMMIC *did* breach its duty to defend Tsakopoulos on the Counterclaim, the aspect of its motion which seeks summary judgment on Tsakopoulos's bad-faith claim fails. However, Tsakopoulos has not shown that either Reliance[19] or LMCC have breached any contractual duty under their policies. Therefore, these Defendants are entitled to summary judgment on Tsakopoulos's bad-faith claims.

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[19] Tsakopoulos apparently acquiesces in this aspect of Defendant Reliance's motion. *See* note 16, *supra*.

V.

CONCLUSION

For the reasons stated, Tsakopoulos's motions are granted in part and denied in part, AMMIC's and LMCC's motion is granted in part and denied in part, and Reliance's motion is granted in part and denied in part. Tsakopoulos's claim for breach of contract against AMMIC is SUMMARILY ADJUDICATED in Tsakopoulos's favor. Tsakopoulos's claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and declaratory relief against LMCC are SUMMARILY ADJUDICATED in LMCC's favor. Tsakopoulos's claims for breach of contract and breach of the implied covenant of good faith and fair dealing against Reliance are SUMMARILY ADJUDICATED in Reliance's favor. It is ADJUDGED AND DECLARED that AMMIC and Reliance owe Tsakopoulos a duty to defend him on the Counterclaim and that Reliance owes Tsakopoulos a duty to indemnify him for his costs in complying with the restorative injunction issued in *Borden Ranch*. The issues of damages on Tsakopoulos's breach of contract claim against AMMIC and of liability and damages on Tsakopoulos's bad-faith claims against AMMIC remain for trial.

IT IS SO ORDERED.

DATED: August 8, 2000

/s/ Garland E. Burrell, Jr.
GARLAND E. BURRELL, JR.
UNITED STATES
DISTRICT JUDGE

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 9

In the matter of:	)	
	)	
Angelo K. Tsakopolous,	)	EPA Docket No.
Respondent.	)	CWA404-09a-96-004
	)	

Proceeding Under Section 309(a) of the Federal Clean Water Act, 33 U.S.C. § 1319(a), As Amended

ADMINISTRATIVE ORDER ON CONSENT

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I. INTRODUCTION

1. This Administrative order on Consent ("Consent Order" or "Order") is entered into voluntarily by the United States Environmental Protection Agency, Region 9 ("EPA"), the United States Army Corps of Engineers ("USAGE") and Angelo K. Tsakopoulos (hereinafter "Respondent"). Respondent is the owner of real property located at an agricultural site known as Borden Ranch in Sacramento and San Joaquin Counties, California. EPA alleges and Respondent denies that Respondent has discharged dredged and/or fill material at the Borden Ranch Site ("Site") in violation of Section 301(a) of the Clean Water Act (the "Act" or "CWA"), 33 U.S.C. § 1311(a), in that these activities were discharges of dredged or fill material into waters of the United States without authorization under Section 404 of the Act. 33 U.S.C. § 1344, and/or in violation of a permit issued pursuant to Section

404 of the Act. This Consent Order directs the Respondent to undertake specified measures to offset the adverse environmental impacts and habitat losses occurring in waters of the United States resulting from the alleged unauthorized activities.

II. JURISDICTION

1. EPA issues this Consent Order under the authority vested in its Administrator by Section 309(a) of the CWA, 33 U.S.C. § 1319(a). This authority has been delegated to the EPA Region 9 Administrator and re-delegated to the Director of Water Management Division. USACE is a party to this Consent Order because of its authority to issue orders requiring compliance with permit conditions pursuant to section 404(s) of the Clean Water Act, 33 U.S.C. § 1344(s).

2. Respondent agrees not to contest EPA's and USACE's jurisdiction or authority to enter into or enforce this Consent Order. Respondent also agrees not to contest the validity of any terms and conditions of this Consent order in any action to enforce, or in any action arising from, the Order. Specifically, Respondent agrees not to contest a determination by the Regional Administrator, EPA Region IX and the District Engineer, USACE Sacramento District, pursuant to Paragraph IX.5., as to the final preservation and/or mitigation requirements with which Respondent must comply.

3. EPA's and USACE's decisions or actions in entering into and pursuant to this Consent Order are not subject to judicial review prior to the United States' initiation of

judicial action to compel Respondent's compliance with this Consent Order.

III. DEFINITIONS

Unless defined herein, terms used in this Consent Order shall have the meaning as assigned in the CWA or in regulations promulgated by EPA or the USACE under the CWA. The following definitions shall apply to this Order:

1. "Consent Order" or "Order" shall mean this document, all attachments hereto, all its subsequent mutually agreed to modifications, and all submissions, including, but not limited to, deliverables, plans, schedules, reports (other than progress reports), maps, technical memoranda and specifications, which are required by this Order and approved by EPA. Upon EPA approval, Respondent's submissions are incorporated and enforceable as part of this Order. In case of inconsistency, this document and its subsequent modifications shall control.

2. "USACE" shall mean the U.S. Army Corps of Engineers.

3. "EPA" shall mean the U.S. Environmental Protection Agency.

4. "USFWS" shall mean the U.S. Fish and Wildlife Service.

5. "Respondent" shall mean Angelo K. Tsakopoulos.

6. "Parties" shall mean the EPA, USACE and Respondent.

7. "Day" shall mean a calendar day unless otherwise specified to be a working day. "Working day" shall mean a day other than a Saturday, Sunday, or federal legal holiday. In computing a prescribed period of time, the day of the event shall not be included. If a stated time period expires on a Saturday, Sunday or federal legal holiday, it shall be extended to include the next working day.

8. "Disturbed Site" shall mean the approximately 2100 acres at Borden Ranch depicted on the attached photographic map and jurisdictional delineation, (Attachment 1). Within this 2100 acres are certain areas which allegedly are regulated as waters of the United States under the CWA and which allegedly have been disturbed by Respondent's discharges. The Disturbed Site is depicted in Attachment 1 and consists of Parcel 2, Parcel 4, Parcel 5 and Prudential (all outlined in orange); Parcel 13, Parcel 15, Parcel 21, and Parcel 22 (all outlined in green) and Parcel 1 of Borden Ranch.

9. "404 Preservation Site" shall mean all portions of the area or areas selected and agreed to by Respondent, USACE (in consultation with USFWS) and EPA as suitable for use to offset the habitat losses of waters of the United States resulting from Respondent's alleged unauthorized activities through preservation of existing environmental values, and which are to be dedicated in a conservation easement, as required in Paragraph IX below. The 404 Preservation Site is depicted in Attachment 1 and consists of Parcel 3 and Parcel 26 (outlined in yellow) of Borden Ranch. The 404 Preservation Site is subject to a thirty (30) foot access easement for ingress

and egress acress [sic] the northern portion of Parcel 26 more particularly described as follows:

> The south thirty (30) feet of the East one-half of the Southwest one-quarter and the West one-half of the Southeast one-quarter of Section 32, in Township 6 North, Range 8 East, M.D.B. & M., according to the official Plat thereof.
>
> This easement provides access to Garry J. Odbert, the owner of the adjacent land which is the East one-half of the Southeast one-quarter of Section 32 in Township 6 North, Range 8 East, M.D.B. & M., according to the official Plat thereof.

A map setting forth the approximate location of this access easement is depicted in Attachment 2.

10. "Additional Preservation Site" shall mean that portion of Borden Ranch that Respondent intends to include within the conservation easement provided for in Paragraph IX in addition to the 404 Preservation Site. The parties agree that the natural values on these parcels will not be included in any determination pursuant to Paragraph IX.5. as to whether Respondent has provided excess mitigation. The Additional Preservation Site is depicted in Attachment 1 and consists of that portion of Parcel 27 of Borden Ranch (excluding the Home Site) that is outlined in blue.

11. "Mitigation Site" shall mean all portions of the area or areas selected and agreed to by Respondent, USACE and EPA suitable for use to offset the habitat losses of waters of the United States resulting from Respondent's alleged unauthorized activities through creation, restoration and/or enhancement of existing environmental

values, and which are to be dedicated in a conservation easement, as required in Section IX below.

12. "Preservation/Mitigation Program" shall mean those deliverables and activities to be produced and/or undertaken by Respondent for purposes of off-setting the temporal and permanent habitat losses resulting from the alleged unauthorized activities. It includes the Preservation Program provided for in Paragraph IX.6. and, if subsequently agreed to by the parties, the Mitigation Program Provided for in Paragraph IX.7.

13. "Work" shall mean all activities Respondent is required to undertake and accomplish under this Consent Order.

IV. PARTIES BOUND

1. This Consent Order shall be binding on Respondent and its officers, directors, partners, agents, employees, attorneys, successors and assigns, and on all persons, independent contractors, contractors, and consultants acting in concert with Respondent.

2. Respondent shall provide a copy of this Consent Order to any successor in interest to its control, operation, or any other interest in all or any portion of the 404 Preservation Site, the Additional Preservation Site, or the Mitigation Site at least thirty (30) days prior to the transfer, and shall simultaneously notify EPA in writing that such notice has been given. Within fourteen (14) days after the effective date of this Consent Order or the date of contracting, whichever is later, Respondent shall provide a copy of this Consent Order to all contractors and/

or consultants they retain to perform any of the Work. Respondent shall condition the transfer of control, operation or any other interest in all or any portion of the 404 Preservation Site, the Additional Preservation Site or the Mitigation Site, and any contract related to the performance of the Work, upon the successful execution of this Consent Order. No transfer or contract shall in any way affect Respondent's obligation to comply fully with all the terms and conditions of this Consent order.

3. The undersigned signatories for Respondent certify that they are authorized to execute this Consent Order and legally bind Respondent.

V. STATEMENT OF PURPOSE

1. The parties enter into this Consent Order to compensate for the alleged environmental and habitat losses caused by the allegedly unauthorized discharges of dredged or fill material (including activities alleged to be not in compliance with Permit # 199300605 issued by USACE) to waters of the United States at Borden Ranch, Sacramento and San Joaquin Counties, California, by implementing a comprehensive program, set forth in Paragraph IX below, of restoration, creation, monitoring and preservation of aquatic resources.

VI. FINDINGS OF FACT

1. Respondent is now and, at all times mentioned herein, is a legal person.

2. Respondent owns real property in Sacramento and San Joaquin Counties as indicated on the attached map

(Attachment 1). This property consists of approximately 8,348 acres and is located in the Lodi-Woodbridge area ("the Site").

3. EPA asserts, and Respondent denies, that Respondent undertook activities that resulted in the discharge of dredged and/or fill material to waters of the United States on the Site.

4. EPA has estimated that the alleged activities resulted in adverse impacts to approximately 49.1 acres of waters of the United States at a 2100 acre portion of the Site (herein referred to as the Disturbed Site). While Respondent does not accept EPA's determination that its activities resulted in the discharge of dredged and/or fill material to waters of the United States on the Site, for purposes of this Consent Order and for determining the appropriate scope of the Preservation and Mitigation, Sites and Preservation/Mitigation Program, and only for that purpose, the parties agree to adopt the EPA estimate that the Respondent's activities resulted in the discharge of dredged and/or fill material in waters that adversely affected 49.1 acres of CWA-regulated waters of the United States at the Disturbed Site. As discussed below in Paragraph IX, Respondent reserves the right to contest the extent of the adverse affects [sic] to the 49.1 acres of CWA-regulated waters of the United States at the Disturbed Site.

5. The Respondent applied for, but did not receive, a permit under section 404 of the CWA to discharge dredged or fill material to some of the alleged CWA-regulated waters of the United States at the Site prior to conducting the activities alleged by EPA to constitute the

discharge of dredged and/or fill material to waters of the United States on the Site.

6. Respondent asserts that it received oral and written assurances from EPA and USACE that the activities alleged by EPA to constitute unauthorized discharges were in fact activities not regulated by the Clean Water Act, and that Respondent relied on such representations in good faith. Respondent asserts that plowing and other soil management activities that do not break up an underlying clay or hard pan are not regulated under the Clean Water Act. Respondent further contends that it did not deep rip any vernal pools in the Disturbed Area. Respondent asserts that since the activities it conducted were not regulated by the Clean Water Act, it was not necessary for Respondent to obtain a permit for said activities. Respondent makes these assertions to clarify Respondent's position for the record, not as a basis for challenging the jurisdictional foundation for this Consent Order. EPA and USACE deny each and every factual assertion in this paragraph.

VII. EPA'S CONCLUSIONS OF LAW AND DETERMINATIONS

1. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant by any person into a "navigable water," or "water of the United States," except in compliance with, among other things, a permit issued under the CWA.

2. Respondent is a "person" as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

3. The Disturbed Site described in Section VI above includes "waters of the United States" under federal regulations implementing Section 502(7) of the CWA. 40 C.F.R. §§ 122.2 and 230.3; 33 C.F.R. § 328.3.

4. The dredged and fill materials described in Section VI above are "pollutants" under Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

5. Placing pollutants within the waters of the U.S. at the Borden Ranch Site is a "discharge of pollutants" under Section 502(12) of the CWA, 33 U.S.C. § 1362(12).

6. By discharging pollutants into waters of the United States without a permit under the CWA, Respondent has violated Section 301(a) of the CWA, 33 U.S.C. § 1311.

7. Respondent denies each and every conclusion of law and determination set forth in paragraphs 1 through 6 above.

VIII. CESSATION OF UNAUTHORIZED DISCHARGES

1. Respondent shall not discharge pollutants into any waters of the United States except in compliance with an appropriate authorization under the CWA.

2. Prior to deep ripping in areas delineated as waters of the United States at Borden Ranch, Respondent shall notify USACE of the planned activity. If USACE determines that the proposed activity requires authorization under the CWA, Respondent shall obtain the required authorization prior to engaging in the activity. Nothing in this paragraph shall limit Respondent's rights to contest a determination by USACE that a particular activity requires authorization.

IX. WORK TO BE PERFORMED

1. Respondent shall take all necessary actions to complete the Work as set forth in the Preservation/Mitigation Program. The Preservation/Mitigation Program is enforceable under this Consent Order.

2. The purpose of the Preservation/Mitigation Program required under this Consent order is to preserve waters of the United States, including vernal pool and other wetland functions, typically associated with Sacramento County wetland habitats, as agreed upon by the parties as set forth in the Preservation/Mitigation Program. If agreed to by the parties, the Preservation/Mitigation Program may, in addition, include a component of creation, restoration and enhancement to aquatic functions.

3. Respondent shall take all necessary actions to complete the dedication of a conservation easement over the 404 Preservation Site and the Additional Preservation Site to a third party approved by USACE (in consultation with USFWS) and EPA protecting these sites in perpetuity, consistent with the provisions of paragraph IX.6. To the extent possible, EPA will assist the Respondent with developing and finalizing the conservation easement, which shall be dedicated no later than May 31, 1996, and prior to any additional activities being conducted in the disturbed areas.

4. The purpose of the 404 Preservation Site is to preserve and protect in perpetuity approximately 1368 acres of land. Conservation and protection of this area (including the waters of the United States included within) has been determined by EPA and USACE to be appropriate

and practicable mitigation for the temporal and permanent loss of the approximately 49.1 acres of waters of the United States at the Disturbed Site. The 404 Preservation Site has been agreed upon by the parties and is depicted in Attachment 1.

5. Respondent contends that the, 404 Preservation Site contains environmental and wildlife functions in excess of that which is needed to compensate for the alleged impacts to functions of waters of the United States resulting from Respondent's activities that are the subject of this Consent Order. Respondent contends that its activities have not adversely affected functions on waters of the United States on the Disturbed Site. EPA and USACE do not agree with Respondent's contention, but do agree to allow for reconsideration of some of the requirements of the Preservation Program as follows:

a. The conservation easement required in Paragraph IX.3. shall not be modified based on this reconsideration except as explicitly provided for in Paragraph IX.5.

b. The parties may conduct studies, to be concluded no later than August 31, 1997 to evaluate the impact to waters of the United States from Respondent's alleged activities. The parties will share data and draft technical reports resulting from their studies.

c. Following completion of the studies, the parties will meet and confer to attempt to resolve any remaining dispute as to the requirements of the Preservation/Mitigation Program, including, but not limited to, whether the Respondent's activities have had a negative or positive

impact on environmental functions on the Disturbed Site, whether the 404 Preservation Site has environmental functions in excess of those needed to compensate for the impacts of Respondent's alleged activities, and whether it is acceptable to include an additional Mitigation site in the Preservation/Mitigation Program where aquatic functions will be created, restored and/or enhanced,

d. If the parties are unable to resolve their dispute as to the requirements of the Preservation/Mitigation Program, any party may, in writing, submit the dispute to the Regional Administrator, EPA Region IX and the District Engineer, USACE Sacramento District for resolution. In deciding the final requirements of the Preservation/Mitigation Program, the Regional Administrator and the District Engineer will not increase the overall burden to Respondent beyond that of implementing the Preservation Program set forth IX.6. The issues which may be submitted for dispute resolution are:

1. To what extent have Respondent's activities caused or contributed to the destruction or degradation of waters of the United States as defined by 33 C.F.R. § 323.2(d)(4), (5), 33 C.F.R. § 328.3(a), and 40 C.F.R. § 230.3(s)?

2. What is the appropriate preservation ratio to apply to the impacts from Respondent's activities in determining how much of the 404 Preservation Site is to be set aside to compensate for Respondent's activities?

3. Is it appropriate to allow Respondent to include an additional Mitigation site in the Preservation/Mitigation Program?

4. Based on the final determination of the extent of the Preservation/Mitigation Program, what environmental functions exist at the 404 Preservation Site in excess of the functions needed to compensate for the impact of Respondent's activities which may be applied to offset impacts to waters of United States from other projects.

e. Attachment 3, incorporated herein by reference, sets forth procedures to be followed in the event any party formally submits the dispute as to the requirements of the Preservation/Mitigation Program to the Regional Administrator and the District Engineer for resolution.

5. The Preservation/Mitigation Program and the granting of the conservation easement for the 404 Preservation Site, the Additional Preservation Sites and the Mitigation Site shall be incorporated and enforceable as part of this Consent Order. Failure to comply fully with the Preservation/Mitigation Program, including any and all of its components, or with the granting of the conservation easement for the 404 Preservation Site, the Additional Preservation Sites and/or the Mitigation Site shall be deemed violations of this Consent Order.

6. The Preservation Program shall include the following elements:

a. Respondent shall grant a conservation easement for the 404 Preservation Site and the Additional Preservation site to an entity approved by

USACE (in consultation with USFWS) and EPA. The easement holder, and any subsequent transferee of the easement shall receive a copy of this Consent Order.

b. The terms of the conservation easement shall be approved by USACE (in consultation with USFWS) and EPA, and shall, at a minimum, provide that the 404 Preservation Site and the Additional Preservation Site are to be managed for the benefit of the sites' habitat functions and values, and in particular for the benefit of the vernal pool ecosystems at the sites. The easement holder will have the authority to restrict as necessary or prevent uses incompatible with these management goals. The easement will establish and adequately endow a program approved by USACE (in consultation with USFWS) and EPA to monitor all adverse direct and indirect efects [sic] on the preserve. This program is intended to monitor and manage such issues as litter and dumping, sediment control, fences and other management issues within the preserve (it is not intended to provide scientific monitoring of vernal pool crustaceans or plant communities). USACE and EPA shall be identified as intended third party beneficiaries of the grant of this conservation easement, and shall be provided notice of and the right to approve any transfer of the conservation easement.

c. Respondent shall implement controls on access to the 404 Preservation Site and the Additional Preservation Site sufficient to minimize disturbance to habitat functions. At a minimum, this shall include post and cable fencing or barbed wire fencing completely surrounding the

sites, with locked gates on any existing roads into the sites.

d. Respondent shall provide sufficient dedicated funding to the easement holder to ensure that the requirements of the Preservation Program are implemented in perpetuity.

e. Respondent shall submit a report for approval to USACE (in consultation with USFWS) and EPA certifying its compliance with the requirements of the Preservation Program.

7. A Mitigation Program shall be developed if Respondent, USACE and EPA agree to include a component of creation, restoration and enhancement to aquatic functions as part of Respondent's compliance obligations under this Consent Order. If a Mitigation Program is developed, it shall be adopted as a modification to this Consent Order, and shall be implemented consistent with the provisions of Paragraph X through XIII.

8. Respondent shall place, or cause to be placed straw wattles, hay bales or equivalent siltation control devices approved by USACE (in consultation with USFWS) along the boundaries of any portions of the Disturbed Site planted as a vineyard, wherever the vineyard boundary intersects the watershed of any vernal pool or other seasonal wetland within 250 feet of the vineyard.

9. Notwithstanding any review, suggestions, comments, or approval by EPA, USACE, or other governmental entities, Respondent shall remain solely responsible for the full and successful implementation of the Preservation/Mitigation Program and for achieving and maintaining full compliance with this Consent Order, the CWA, and any applicable laws, regulations and permits.

X. QUALIFICATIONS FOR MITIGATION PROGRAM WORK

1. All Mitigation Program Work shall be done by and under the supervision of persons with sufficient education, experience and expertise for the work.

2. Respondent shall, within twenty-one (21) days of selecting its general contractor for the Mitigation Program Work, provide EPA with a list identifying the contractor, the names, titles and qualifications of the contractor's designated project manager(s) used by Respondent or their contractor to perform Work related to the Mitigation Program. Respondent shall notify EPA in writing of any subsequent changes or additions to this list.

XI. MODIFICATION OF CONSENT ORDER

1. EPA may, after consultation with Respondent, make a preliminary determination that tasks in addition to those defined in the Mitigation Program, including any approved modifications, are necessary to accomplish the purposes of the Mitigation Program as set forth in Section IX above. EPA shall notify Respondent of its preliminary determination in writing and Respondent shall have thirty (30) days from receipt to submit a written response.

2. Modification of this Consent Order shall be in writing and shall take effect only when agreed to and signed by all the parties.

XII. PROGRESS MEETINGS AND REPORTS

1. Respondent shall meet or confer by phone with EPA at least every three weeks and as frequently as EPA requests, during the initiation, conduct, and completion of all of the Mitigation Program to discuss the technical aspects of the Mitigation Program, and any anticipated problems or new issues. Meetings or conference calls will be directed by EPA and scheduled at EPA's discretion. EPA and Respondent have the discretion to invite other federal, state and local government agencies and the public to participate in any of the meetings or conference calls.

XIII. ACCESS TO SITE AND DATA

1. At EPA's written request, Respondent shall submit requested results or data relative to the Mitigation Program within seven (7) days from receipt of the results or data by Respondent.

2. Respondent shall notify EPA in writing at least fifteen (15) days prior to conducting significant events (as defined in the Mitigation Program) in preparation for or in accordance with the Mitigation Program.

3. This Consent Order shall in no way affect EPA's authority to enter, inspect, sample or monitor compliance under any law, permit, court order or agreement and Respondent shall use their best efforts to arrange for access by EPA or its authorized representatives for determining compliance with this Consent Order until termination of this Consent Order. For purposes of this Consent Order, EPA's authorized representatives shall

include all EPA employees and contractors, all Corps employees and contractors, and such other person as EPA may designate. Such access shall exclude any attorney/client privileged information and/or documentation.

XIV. DESIGNATED PROJECT COORDINATORS

1. The parties have designated their respective Project Coordinators as follows:

A. For EPA:

Elizabeth White (W-3-3)
U.S. Environmental Protection Agency, Region 9
Wetlands and Sediment Management Section
75 Hawthorne Street
San Francisco, California 94105
(Tel) (415) 744-1988
(Fax) (415) 744-1078

B. For USACE

Tom Cavanaugh
U.S. Army Corps of Engineers, Sacramento District
Regulatory Branch
1325 J Street
Sacramento, CA 95814
(Tel) (916) 557-5261
(Fax) (916) 557-6877

C. For Respondent:

Angelo K. Tsakopoulos
AKT Development Corporation
7700 College Town Drive, Suite 101
Sacramento, CA 95826-2397
(Tel) (916) 383-2500
(Fax)

2. The Project Coordinators shall be responsible for overseeing the implementation of this Consent Order and receiving communications, which include, but are not limited to, all documents, reports, comments, approvals, and other correspondence submitted or exchanged under this Consent Order.

3. EPA, USACE and Respondent each may change their respective Project Coordinator by giving the other party ten (10)-day advance written notice.

4. Respondent's Project Coordinator may assign a representative, or alternate Project Coordinator, including a contractor, to serve as site representative for oversight of completion of the Preservation/Mitigation program.

5. EPA may arrange for a qualified person not on EPA staff to assist in its oversight and review of the implementation of the Preservation/Mitigation Program. The person may observe work and make inquiries but is not authorized to modify this Consent order, including the Preservation/Mitigation Program.

XV. SUBMISSIONS AND NOTIFICATIONS

1. All submissions required by this Consent Order shall be signed by Respondent's principal executive officer, or by that Person's duly authorized representative. The authorization must be in writing and specify either an individual or a position having responsibility for the overall operation of the activities being reported or for Respondent's environmental matters.

2. The person signing Respondent's submissions shall make the following certification:

I certify under penalty of law that the information submitted is true and correct to the best of my knowledge and belief. I am aware that there are significant penalties for submitting false information, including, but not limited to, the possibility of fines and imprisonment for knowing violations under § 309 of the Clean Water Act, 18 U.S.C. § 1001, and other relevant federal statutes.

3. Unless otherwise specified or requested by EPA, Respondent shall provide an original and one copy of each deliverable required under this Consent order by first-class mail to EPA's Project Coordinator.

4. Submissions by Respondent shall be deemed made on the date they are postmarked.

XVI. RECORD PRESERVATION

1. Respondent shall preserve and retain, and shall instruct their contractors, subcontractors and any other person acting on their behalf, to preserve and retain all records and documents that relate in any manner to the Disturbed Site and/or the Preservation or Mitigation Site for three (3) years after termination of this Consent Order. Upon termination of the three-year period, Respondent shall notify EPA at least ninety (90) days prior to the scheduled destruction of the documents. If EPA requests that the documents be saved, Respondent shall, at no cost to EPA, give EPA the documents or copies of the documents.

XVII. DELAY OF PERFORMANCE/FORCE MAJEURE

1. "Force Majeure," for purposes of this Consent Order, is any event entirely beyond the control of Respondent or any entity controlled by Respondent, including its contractors, consultants and subcontractors, that delays or prevents performance of any obligation under this Consent Order notwithstanding Respondent' best efforts to avoid the delay. The best efforts requirement includes using best efforts to anticipate any such event and minimize the delay caused by any such event to the greatest extent practicable. Examples of events that are not force majeure events include, but are not limited to, increased costs or expenses of any work to be performed under this Consent Order, financial or business difficulties of Respondent, and normal inclement weather.

2. If any event may occur or has occurred that may delay the performance of any obligation under this Consent Order, whether or not caused by a force majeure, Respondent shall notify by telephone the EPA Project Coordinator or, in his or her absence, the Chief of the Wetlands and Sediment Management Section (W-3-3), EPA Region 9, within two business days of when Respondent knew that the event might cause a delay. Within fifteen (15) days thereafter, Respondent shall provide in writing the reasons for the delay, the anticipated duration of the delay, the measures taken or to be taken to prevent or minimize the delay, a timetable by which those measures will be implemented, and whether, in Respondent's opinion, such event may cause or contribute to an endangerment to public health, welfare or the environment. Respondent shall exercise their best efforts to avoid or minimize any delay and any effects of a delay. Failure to

comply with the notice requirements of this paragraph shall preclude Respondent from asserting any claim of force majeure.

3. If EPA agrees that an actual or anticipated delay is attributable to force majeure, the time for performance of the obligation shall be extended by written agreement of the parties. An extension of the time for performing an obligation directly affected by the force majeure event shall not, of itself, extend the time for performing a subsequent obligation.

4. Respondent shall have the burden of demonstrating, by a preponderance of the evidence, that the actual or anticipated delay has been or will be caused by a force majeure event, that the duration of the delay was or will be warranted under the circumstances, that Respondent did exercise or are using their best efforts to avoid and mitigate the effects of the delay, and that Respondent complied with the requirements of this section.

XVIII. FAILURE TO COMPLY WITH CONSENT ORDER

1. In the event of circumstances which EPA considers a potential violation of the provisions of this Consent Order on the part of Respondent, EPA shall use its best efforts to (i) provide Respondent with notice either orally or in writing of the facts or conduct which allegedly constitute violation, and (ii) inform Respondent of the appropriate remedial actions to cure the alleged violation.

2. EPA reserves all available legal and equitable remedies to enforce this Consent Order, and the right to seek recovery of any costs and attorney fees incurred by

EPA in any actions against Respondent for non-compliance with this Consent Order. Nothing in this Consent Order shall in any way limit Respondent's rights to recover attorney fees consistent with applicable law.

3. Failure to comply with this Consent order is a violation of the CWA. Such violation may subject Respondent to injunctive relief under Section 309(b) of the CWA, 33 U.S.C. § 1319(b), and civil penalties not to exceed $25,000 per day for each violation under Section 309(d) of the CWA, 33 U.S.C. § 1319(d). In addition, a negligent violation is punishable by a fine of not less than $2,500 nor more than $25,000 per day of violation, or imprisonment for not more than one year, or by both, 33 U.S.C. § 1319(c)(1); a knowing violation is punishable by a fine of not less than $5,000 nor more than $50,000 per day of violation, or imprisonment for not more than three years, or by both. 33 U.S.C. § 1319(c)(2).

XIX. SCOPE OF CONSENT ORDER

1. This Consent Order is not and shall not be construed to be a permit under the CWA, nor shall it in any way relieve or affect Respondent's obligations under the CWA, or any other applicable federal, state or local laws, regulations and permits. Compliance with this Consent Order shall be no defense to any actions commenced pursuant to such applicable laws, regulations or permits. EPA and USACE find that Respondent's compliance with the provisions of this Consent Order will satisfy the objectives of the Clean Water Act and provide adequate and appropriate relief with respect to section 404 of the

Act as applicable to Respondent's activities at the Disturbed Site that are the subject of this Consent Order.

2. This Consent Order shall in no way affect the rights of EPA, USACE or the United States against any person not a party hereto.

XX. SEVERABILITY

The provisions of this Consent Order shall be severable. Should any provision be declared by a court of competent jurisdiction to be unenforceable, the remaining provisions shall remain in full force and effect.

XXI. TERMINATION AND SATISFACTION

This Consent Order shall terminate when EPA issues a written approval of Respondent's written certification that Respondent has fully completed all Work required under this Consent Order, including any additional tasks which EPA has determined to be necessary in accordance with Section XI above. Respondent's certification of completion shall comply with requirements set forth in Section XV above.

XXII. EFFECTIVE DATE

This Consent Order shall take effect upon signature by all parties.

IT IS SO AGREED AND ORDERED:

For UNITED STATES
ENVIRONMENTAL PROTECTION
AGENCY
REGION 9

Dated: 1 May 1996

/s/ Alexis Strauss
Alexis Strauss
Acting Director
Water Management Division

For UNITED STATES ARMY
CORPS OF ENGINEERS
SACRAMENTO DISTRICT

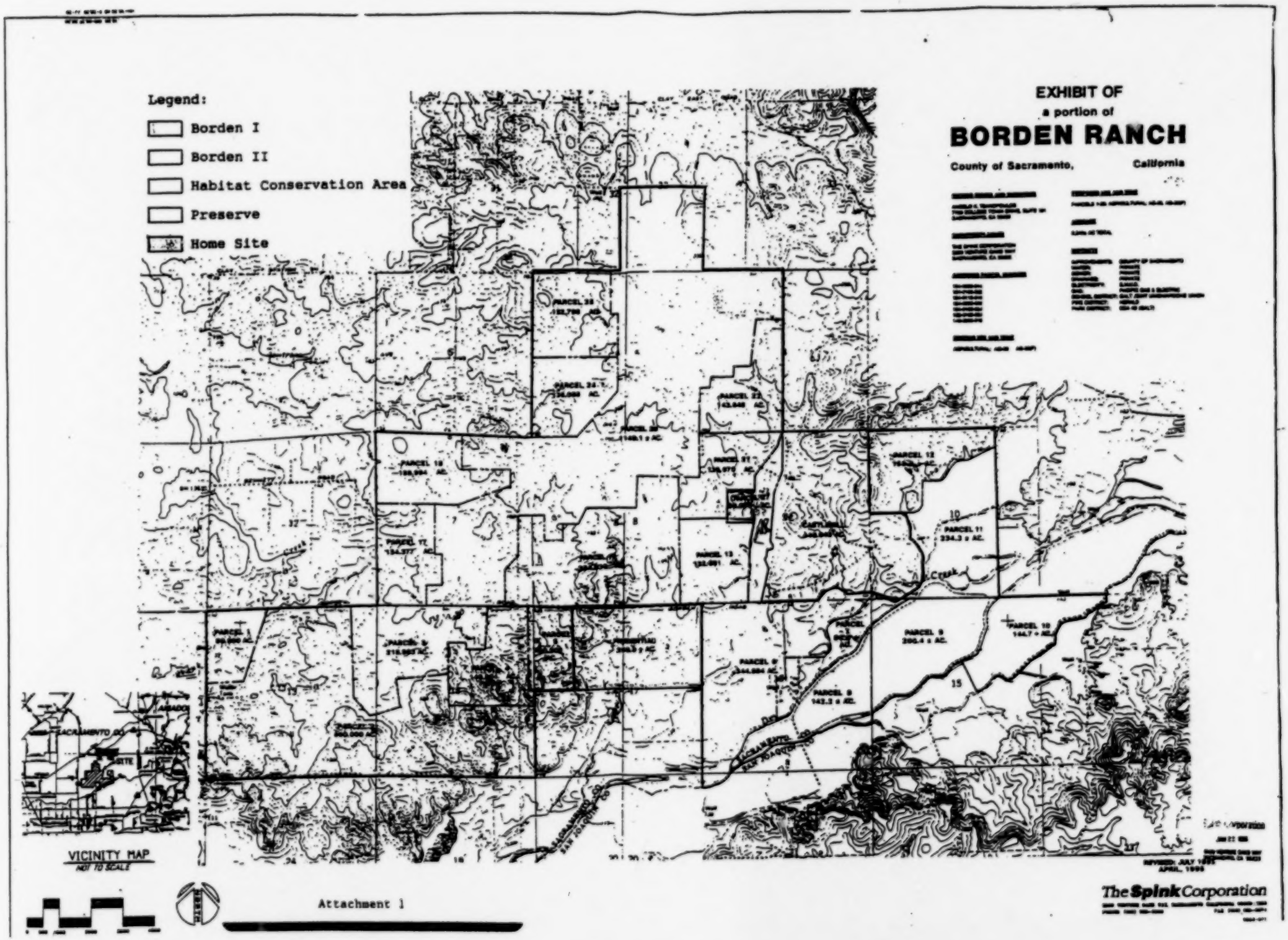
Dated: 3 May 1996

/s/ Colonel John N. Reese
Colonel John N. Reese
District Engineer

For RESPONDENT Angelo K.
Tsakopoulos

Dated: May 2 1996

/s/ Angelo K. Tsakopoulos
Angelo K. Tsakopoulos



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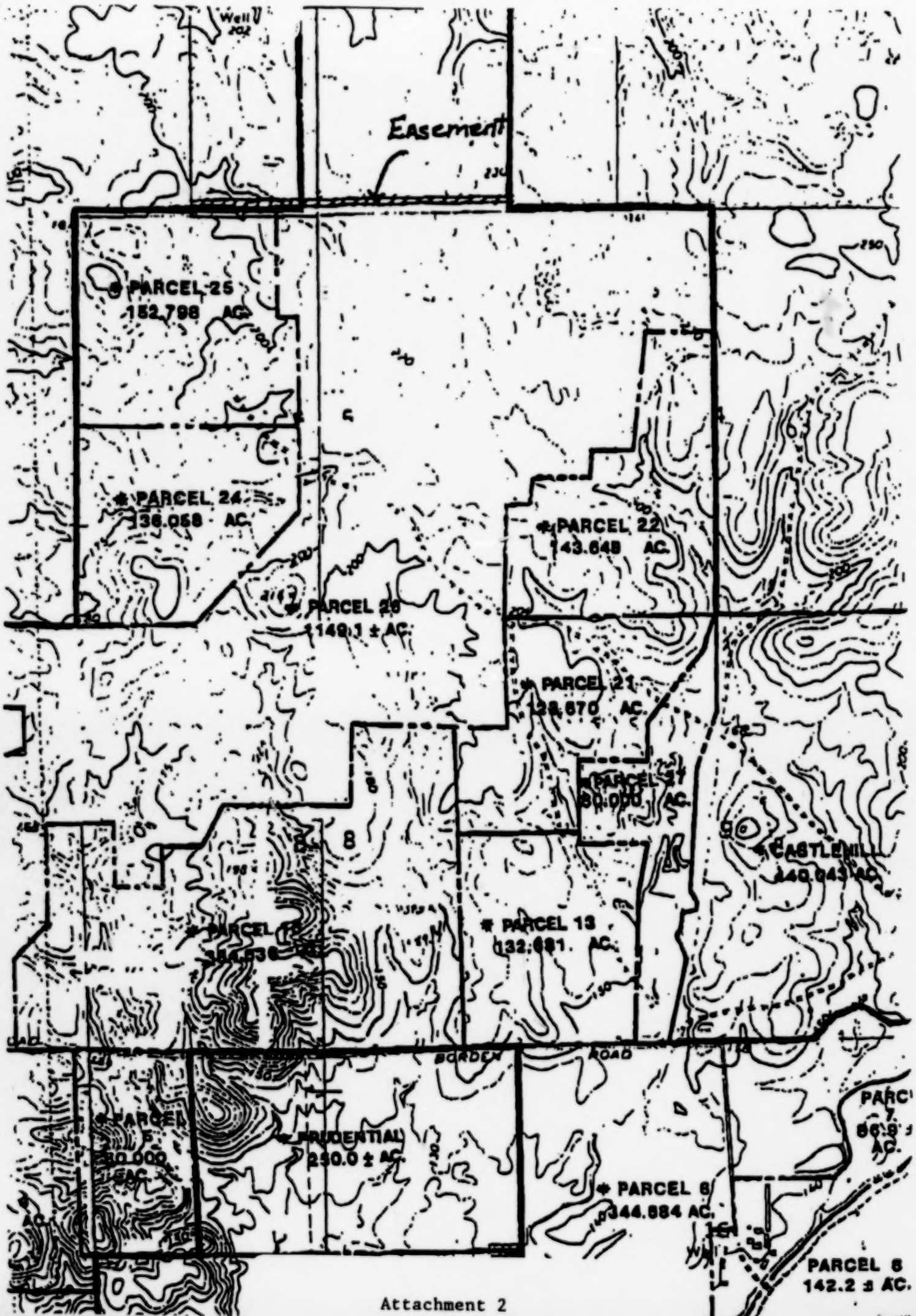

Attachment 2

Attachment 3

In the Matter of Angelo K. Tsakopoulos

EPA Docket No. CWA404-09a-96-004

Dispute Resolution Procedures

Purpose and Scope

These procedures shall apply if either party to the above-referenced order invokes the formal dispute resolution procedures authorized by paragraph IX.5.d. of the order. These procedures shall not apply to any other matter, including, but not limited. to, any other dispute over the terms and conditions of the order. For purposes of these procedures, EPA and USACE shall be treated as a single party.

Invocation of Dispute Resolution

The party seeking to invoke dispute resolution shall do so in writing. The document invoking dispute resolution shall identify the nature of the dispute, shall certify that good faith efforts have been undertaken to resolve the dispute, and shall describe specifically which of those issues identified in paragraphs IX.5.d.1. through IX.5.d.4. the party seeks to resolve through dispute resolution. The other party to the order may identify additional issues from those identified in paragraphs IX.5.d.1 through IX.5.d.4. for dispute resolution in writing within 15 days of service of the initial submittal invoking dispute resolution.

Document Submission

The parties shall submit their opening briefs in support of their proposed resolution to the dispute no later than 45 days after service of the initial submittal invoking dispute resolution. These briefs shall not exceed 25 pages in length. These briefs may be accompanied by final technical reports based on the studies provided for in paragraph IX.5.b. if the party submitting the report has complied with the requirements of paragraph IX.5.b. concerning the sharing of data and draft technical reports.

The parties may submit rebuttal briefs responding to opening briefs no later than 30 days after service of the opening briefs. These briefs shall not exceed 10 pages in length.

Ex Parte Contacts

The parties will comply with regulations governing ex parte contacts set forth at 40 CFR § 124.78. Consistent with these regulations, the Regional Administrator and the District Engineer may designate staff as members of the decisional body to assist in making their final determination. Such staff, if any, shall be designated in writing. The parties shall comply with the 40 CFR § 124.78 requirements with respect to such staff upon service of such designation. These limitations relating to ex parte contacts do not limit the parties' rights to contact other government officials except as specifically limited in 40 CFR § 124.78.

Decisionmaking Procedures

The Regional Administrator and the District Engineer shall make their decision within 90 days of the filing of the final brief authorized in this matter (unless this time is extended as authorized below). The Regional Administrator and the District Engineer will determine, in their discretion, whether to have any form of hearing on matters presented for their decision. They may also propose additional settlement discussions between the parties with or without their participation.

Extension of Time

The deadlines for submission of any documents required by these procedures may be extended by agreement of the parties. The parties may also jointly petition to stay the proceedings at any time prior to a final decision for purposes of negotiating a settlement.

Service

All documents other than briefs and technical reports will be served by fax and first class mail on the parties as designated below, except that service on the Regional Administrator and District Engineer shall be by first class mail only. Briefs and technical reports will be served by overnight mail. Each party shall notify the other in writing of any change to the parties to be served.

Service to EPA shall be as follows:

Felicia Marcus
Regional Administrator
U.S. EPA Region IX
75 Hawthorne Street
San Francisco, CA 94105

Hugh Barroll
Assistant Regional Counsel
U.S. EPA Region IX
75 Hawthorne Street
San Francisco, CA 94105
FAX: (415) 744-1321

Service to USACE shall be as follows

Colonel John N. Reese
District Engineer
U.S. Army Corps of Engineers
Sacramento District
1325 J Street
Sacramento, CA 95814

Lisa Clay
U.S. Army Corps of Engineers
Sacramento District
1325 J Street, Room 1340
Sacramento, CA 95814
FAX: (916) 557-5118

Service to Angelo K. Tsakopoulos shall be as follows:

Angelo K. Tsakopoulos
AKT Development Corporation
7700 College Town Drive, Suite 101
Sacramento, CA 95826-2397
FAX: (916) 383-0552

Computation of Time

For purposes of these procedures, day shall mean calendar day, provided, however, that if the deadline for any action falls on a Saturday, Sunday or Federal holiday, that deadline shall be extended to the next working day.

[SEAL] **Department of the Army** [LOGO]
U.S. Army Corps of Engineers

United States Environmental Protection Agency

12 DEC 1996

MEMORANDUM TO THE FIELD

SUBJECT: Applicability of Exemptions under Section 404(f) to "Deep-Ripping" Activities in Wetlands

PURPOSE: The purpose of this memorandum is to clarify the applicability of exemptions provided under Section 404(f) of the Clean Water Act (CWA) to discharges associated with "deep-ripping" and related activities in wetlands.[1]

BACKGROUND:

1. Section 404(f)(1) of the CWA exempts from the permit requirement certain discharges associated with normal farming, forestry, and ranching practices in waters of the United States, including wetlands. Discharges into waters subject to the Act associated with farming, forestry, and ranching practices identified under Section 404(f)(1) do not require a permit except as provided under Section 404(f)(2).

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[1] As this guidance addresses primarily agricultural-related activities, characterizations of such practices have been developed in consultation with experts at the U.S. Department of Agriculture (USDA), Natural Resources Conservation Service.

2. Section 404(f)(1) does not provide a total, automatic exemption for all activities related to agricultural, silvicultural, or ranching practices. Rather, Section 404(f)(1) exempts only those activities specifically identified in paragraphs (A) through (F), and "other activities of essentially the same character as named" [44 FR 34264]. For example, Section 404(f)(1)(A) lists discharges of dredged or fill material from "normal farming, silvicultural, and ranching activities, such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices."

3. Section 404(f)(1)(A) is limited to activities that are part of an "established (i.e., ongoing) farming, silviculture, or ranching operation." This "established" requirement is intended to reconcile the dual intent reflected in the legislative history that although Section 404 should not unnecessarily restrict farming, forestry, or ranching from continuing at a particular site, discharge activities which could destroy wetlands or other waters should be subject to regulation.

4. EPA and Corps regulations [40 CFR 230 and 33 CFR 320] and preamble define in some detail the specific "normal" activities listed in Section 404(f)(1)(A). Three points may be useful in the current context:

> a. As explained in the preamble to the 1979 proposed regulations, the words "such as" have been consistently interpreted as restricting the section "to the activities *named* in the statute and other activities of essentially the same character as named," and "preclude the extension of the

exemption . . . to activities that are unlike those named." [44 FR 34264].

b. Plowing is specifically defined in the regulations *not* to include the redistribution of surface material in a manner which converts wetlands areas to uplands [See 40 CFR 233.35(a)(1)(iii)(D)].

c. Discharges associated with activities that establish an agricultural operation in wetlands where previously ranching had been conducted, represents a "change in use" within the meaning of Section 404(f)(2). Similarly, discharges that establish forestry practices in wetlands historically subject to agriculture also represent a change in use of the site [See 40 CFR 233.35(c)].

5. The statute includes a provision at Section 404(f)(2) that "recaptures" or reestablishes the permit requirement for those otherwise exempt discharges which:

a. convert an area of the waters of the U.S. to a new use, *and*

b. impair the flow or circulation of waters of the U.S. *or* reduce the reach of waters of the U.S.

Conversion of an area of waters of the U.S. to uplands triggers both provisions (a) and (b) above. Thus, at a minimum, any otherwise exempt discharge that results in the conversion of waters of the U.S. to upland is recaptured under Section 404(f)(2) and requires a permit. It should be noted that in order to trigger the recapture provisions of Section 404(f)(2), the discharges themselves need not be the sole cause of the destruction of the wetland or other change in use or sole cause of the reduction or impairment of reach, flow, or circulation of

waters of the U.S. Rather, the discharges need only be "incidental to" or "part of" an activity which is intended to or will forseeably bring about that result. Thus, in applying Section 404(f)(2), one must consider discharges in context, rather than isolation.

ISSUE:

1. Questions have been raised involving "deep-ripping" and related activities in wetlands and whether discharges associated with these actions fall within the exemptions at Section 404(f)(1)(A). In addition, the issue has been raised whether, if such activities fall within the exemption, they would be recaptured under Section 404(f)(2).

2. "Deep-ripping" is defined as the mechanical manipulation of the soil to break up or pierce highly compacted, impermeable or slowly permeable subsurface soil layers, or other similar kinds of restrictive soil layers. These practices are typically used to break up these subsoil layers (e.g., impermeable soil layer, hardpan) as part of the initial preparation of the soil to establish an agricultural or silvicultural operation. Deep-ripping and related activities are also used in established farming operations to break up highly compacted soil. Although deep-ripping and related activities may be required more than once, the activity is typically not an annual practice. Deep-ripping and related activities are undertaken to improve site drainage and facilitate deep root growth, and often occur to depths greater than 16 inches and, in some cases, exceeding 4 feet below the surface. As such, it requires the use of heavy equipment, including bulldozers, equipped with ripper-blades, shanks, or chisels

often several feet in length. Deep-ripping and related activities involve extending the blades to appropriate depth and dragging them through the soil to break up the restrictive layer.

3. Conversely, plowing is defined in EPA and Corps regulations [40 CFR 230 and 33 CFR 320] as "all forms of primary tillage . . . used . . . for the breaking up, cutting, turning over or stirring of soil to prepare it for the planting of crops" [40 CFR 232.3(d)(4)]. As a general matter, normal plowing activities involve the annual, or at least regular, preparation of soil prior to seeding or other planting activities. According to USDA, plowing generally involves the use of a blade, chisel, or series of blades, chisels, or discs, usually 8-10 inches in length, pulled behind a farm vehicle to prepare the soil for the planting of annual crops or to support an ongoing farming practice. Plowing is commonly used to break up the surface of the soil to maintain soil tilth and to facilitate infiltration throughout the upper root zone.

DISCUSSION:

1. Plowing in wetlands is exempt from regulation consistent with the following circumstances:

a. it is conducted as part of an ongoing, established agricultural, silvicultural, or ranching operation; and

b. the activity is consistent with the definition of plowing in EPA and Corps regulations [40 CFR 230 and 33 CFR 320]; and

c. the plowing is not incidental to an activity that results in the immediate or gradual conversion of wetlands to non-waters.

2. Deep-ripping and related activities are distinguishable from plowing and similar practices (e.g., discing, harrowing) with regard to the purposes and circumstances under which it is conducted, the nature of the equipment that is used, and its effect, including in particular the impacts to the hydrology of the site.

a. Deep-ripping and related activities are commonly conducted to depths exceeding 16 inches, and as deep as 6-8 feet below the soil surface to break restrictive soil layers and improve water drainage at sites that have not supported deeper rooting crops. Plowing depths, according to USDA, rarely exceed one foot into the soil and not deeper than 16 inches without the use of special equipment involving special circumstances. As such, deep-ripping and related activities typically involve the use of specialized equipment, including heavy mechanized equipment and bulldozers, equipped with elongated ripping blades, shanks, or chisels often several feet in length. Moreover, while plowing is generally associated with ongoing operations, deep-ripping and related activities are typically conducted to prepare a site for establishing crops not previously planted at the site. Although deep-ripping may have to be redone at regular intervals in some circumstances to maintain proper soil drainage, the activity is typically not an annual or routine practice.

b. Frequently, deep-ripping and related activities are conducted as a preliminary step for converting a "natural" system or for preparing

rangeland for a new use such as farming or silviculture. In those instances, deep ripping and related activities are often required to break up naturally-occurring impermeable or slowly permeable subsurface soil layers to facilitate proper root growth. For example, for certain depressional wetlands types such as vernal pools, the silica-cemented hardpan (durapan) or other restrictive layer traps precipitation and seasonal runoff creating ponding and saturation conditions at the soil surface. The presence of these impermeable or slowly permeable subsoil layers is essential to support the hydrology of the system. Once these layers are disturbed by activities such as deep-ripping, the hydrology of the system is disturbed and the wetland is often destroyed.

c. In contrast, there are other circumstances where activities such as deep-ripping and related activities are a standard practice of an established on-going farming operation. For example, in parts of the Southeast, where there are deep soils having a high clay content, mechanized farming practices can lead to the compaction of the soil below the soil surface. It may be necessary to break up, on a regular although not annual basis, these restrictive layers in order to allow for normal root development and infiltration. Such activities may require special equipment and can sometimes occur to depths greater than 16 inches. However, because of particular physical conditions, including the presence of a water table at or near the surface for part of the growing season, the activity typically does not have the effect of impairing the hydrology of the system or otherwise altering the wetland characteristics of the site.

CONCLUSION:

1. When deep-ripping and related activities are undertaken as part of an *established, ongoing* agricultural silvicultural, or ranching operation, to break up compacted soil layers *and* where the hydrology of the site will not be altered such that it would result in conversion of waters of the U.S. to upland, such activities are exempt under Section 404(f)(1)(A).

2. Deep-ripping and related activities in wetlands are *not* part of a normal, ongoing activity, and therefore *not* exempt, when such practices are conducted in association with efforts to establish for the first time (or when a previously established operation was abandoned) an agricultural, silvicultural or ranching operation. In addition, deep-ripping and related activities are not exempt in circumstances where such practices would trigger the "recapture" provision of Section 404(f)(2):

> a) Deep-ripping to establish a farming operation at a site where a ranching or forestry operation was in place is a change in use of such a site. Deep-ripping and related activities that also have the effect of altering or removing the wetland hydrology of the site would trigger Section 404(f)(2) and such ripping would require a permit.
>
> b) Deep-ripping a site that has the effect of converting wetlands to non-waters would also trigger Section 404(f)(2) and such ripping would require a permit.

3. It is the agencies' experience that certain wetland types are particularly vulnerable to hydrological alteration as a result of deep-ripping and related activities.

Depressional wetland systems such as prairie potholes, vernal pools and playas whose hydrology is critically dependent upon the presence of an impermeable or slowly permeable subsoil layer are particularly sensitive to disturbance or alteration of this subsoil layer. Based upon this experience, the agencies have concluded that, as a general matter, deep-ripping and similar practices, consistent with the descriptions above, conducted in prairie potholes, vernal pools, playas and similar depressional wetlands destroy the hydrological integrity of these wetlands. In these circumstances, deep-ripping in prairie potholes, vernal pools, and playas is recaptured under Section 404(f)(2) and requires a permit under the Clean Water Act.

/s/ Robert H. Wayland III
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Director
Office of Wetlands, Oceans and Watersheds
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NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BORDEN RANCH PARTNERSHIP; ANGELO K. TSAKOPOULOS, Plaintiffs-Appellants, v. UNITED STATES ARMY CORPS OF ENGINEERS; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, an agency of the United States, Defendants-Appellees.	No. 00-15700 D.C. No. CV-97-00858-GEB (JFM) (Eastern California) ORDER (Filed Nov. 28, 2001)

Before: CANBY, HAWKINS, and GOULD, Circuit Judges.

Judge Canby recommended denying the petition for rehearing en banc. Judge Hawkins voted to deny the petition for rehearing en banc and Judge Gould voted to grant the same.

The full court was advised of the petition for rehearing en banc and no active judge requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is denied.

UNITED STATES CODE

1. 33 U.S.C. section 1311(a).

(a) Illegality of pollutant discharges except in compliance with law.

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

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2. 33 U.S.C. section 1319(d).

(d) Civil penalties; Factors considered in determining amount.

Any person who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a State, or in a permit issued under section 1344 of this title by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. For purposes of this

subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

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3. 33 U.S.C. section 1344(a).

(a) Discharge into navigable waters at specified disposal sites.

The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

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4. 33 U.S.C. section 1344(f)(1)(A).

(f) Non-prohibited discharge of dredged or fill material.

(1) Except as provided in paragraph (2) of this subsection, the discharge of dredged or fill material –

(A) from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices; is not prohibited by or otherwise subject to regulation under this section or section 1311(a) or 1342 of this title (except for

effluent standards or prohibitions under section 1317 of this title).

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5. 33 U.S.C. section 1344(f)(2).

(2) Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

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6. 33 U.S.C. section 1362(6).

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces" within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in

which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

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7. 33 U.S.C. section 1362(12).

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

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8. 33 U.S.C. section 1362(14).

(14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

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9. 33 U.S.C. section 1362(16).

(16) The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

CODE OF FEDERAL REGULATIONS

1. 33 C.F.R. section 323.2(d)(1)(iii).

(d)(1) Except as provided below in paragraph (d)(3), the term *discharge of dredged material* means any addition of dredged material into, including redeposit of dredged material other than incidental fallback within, the waters of the United States. The term includes, but is not limited to, the following:

(iii) Any addition, including redeposit other than incidental fallback, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation.

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2. 33 C.F.R. sections 323.2(d)(2)(i), 323.2(d)(2)(ii).

(2)(i) The Corps and EPA regard the use of mechanized earth-moving equipment to conduct landclearing, ditching, channelization, in-stream mining or other earth-moving activity in waters of the United States as resulting in a discharge of dredged material unless project-specific evidence shows that the activity results in only incidental fallback. This paragraph (i) does not and is not

intended to shift any burden in any administrative or judicial proceeding under the CWA.

(ii) *Incidental fallback* is the redeposit of small volumes of dredged material that is incidental to excavation activity in waters of the United States when such material falls back to substantially the same place as the initial removal. Examples of incidental fallback include soil that is disturbed when dirt is shoveled and the back-spill that comes off a bucket when such small volume of soil or dirt falls into substantially the same place from which it was initially removed.

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3. 33 C.F.R. section 323.2(d)(3)(iii).

(3) The term *discharge of dredged material* does not include the following:

(iii) Incidental fallback.

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4. 33 C.F.R. section 323.2(d)(4)(iii).

(4) Section 404 authorization is not required for the following:

(iii) Certain discharges, such as those associated with normal farming, silviculture, and ranching activities, are not prohibited by or otherwise subject to regulation under section 404. See 33 CRF [sic] 323.4 for discharges that do not require[d] [sic] permits.

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5. 33 C.F.R. sections 323.4(a)(1)(i), 323.4(a)(1)(ii).

§ 323.4 Discharges not requiring permits

(a) *General.* Except as specified in paragraphs (b) and (c) of this section, any discharges of dredged or fill material that may result from any of the following activities is not prohibited by or otherwise subject to regulation under section 404:

(1)(i) Normal farming, silviculture and ranching activities such as plowing, seeding, cultivating, minor drainage, and for the harvesting production of food, fiber, and forest products or soil and water conservation practices, as defined in paragraph (a)(1)(iii) of this section.

(ii) To fall under this exemption, the activities specified in paragraph (a)(1)(i) of this section must be part of an established (i.e., on-going) farming, silviculture, or ranching operation and must be in accordance with definitions in § 323.4(a)(1)(iii). Activities on areas lying fallow as part of a conventional rotational cycle are part of an established operation. Activities which bring an area into farming, silviculture, or ranching use are not part of an established operation. An operation ceases to be established when the area on which it was conducted has been co[n]verted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operations. If an activity takes place outside the waters of the United States, or if it does not involve a discharge, it does not need a section 404 permit,

whether or not it is part of an established farming, silviculture, or ranching operation.

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6. 33 C.F.R. section 323.4(a)(1)(iii)(D).

(D) *Plowing* means all forms of primary tillage, including moldboard, chisel, or wide-blade plowing, discing, harrowing and similar physical means utilized on farm, forest or ranch land for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops. The term does not include the redistribution of soil, rock, sand, or other surficial materials in a manner which changes any area of the waters of the United States to dry land. For example, the redistribution of surface materials by blading, grading, or other means to fill in wetlands is not plowing. Rock crushing activities which result in the loss of natural drainage characteristics, the reduction of water storage and recharge capabilities, or the overburden of natural water filtration capacities do not constitute plowing. Plowing as described above will never involve a discharge of dredged or fill material.

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7. 40 C.F.R. section 232.2(4)(iii).

(4) Section 404 authorization is not required for the following:

(iii) Certain discharges, such as those associated with normal farming, silviculture, and ranching activities, are not prohibited by or otherwise subject to regulation under Section 404.

See 40 CFR 232.3 for discharges that do not require permits.

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8. 40 C.F.R. sections 232.3(c)(1)(i), 232.3(c)(1)(ii).

(c) The following activities are exempt from section 404 permit requirements, except as specified in paragraphs (a) and (b) of this section:

(1)(i) Normal farming, silviculture and ranching activities such as seeding, cultivating, minor drainage, and harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices, as defined in paragraph (d) of this section.

(ii)(A) To fall under this exemption, the activities specified in paragraph (c)(1) of this section must be part of an established (i.e., ongoing) farming, silviculture, or ranching operation, and must be in accordance with definitions in paragraph (d) of this section. Activities on areas lying fallow as part of a conventional rotational cycle are part of an established operation.

(B) Activities which bring an area into farming, silviculture or ranching use are not part of an established operation. An operation ceases to be established when the area in which it was conducted has been converted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operation. If an activity takes place outside the waters of the United States, or if it does not involve a discharge, it does not need a section 404 permit

whether or not it was part of an established farming, silviculture or ranching operation.

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9. 40 C.F.R. section 232.3(d)(4).

(4) Plowing means all forms of Primary tillage, including moldboard, chisel, or wide blade plowing, discing, and similar physical means used on farm, forest or ranch land for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops. Plowing does not include the redistribution of soil, rock, sand, or other surficial materials in a manner which changes any area of the waters of the United States to dryland. For example, the redistribution of surface materials by blading, grading, or other means to fill in wetland areas is not plowing. Rock crushing activities which result in the loss of natural drainage characteristics, the reduction of water storage and recharge capabilities, or the overburden of natural water filtration capacities do not constitute plowing. Plowing, as described above, will never involve a discharge of dredged or fill material.